79-1895

APPENDIX

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

ALLIED CHEMICAL CORPORATION, ET AL.,
Petitioners,

v.

DAIFLON, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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APPENDIX A

UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

No. 79-1459

DAIFLON, INC., *Petitioner,*

v.

The HONORABLE LUTHER BOHANON, Judge of the United States District Court for the Western District of Oklahoma, *Respondent.*

Argued and Submitted October 9, 1979

Decided December 21, 1979

Before McWILLIAMS, BREITENSTEIN and DOYLE, Circuit Judges.

WILLIAM E. DOYLE, Circuit Judge.

These are proceedings in which Daiflon seeks review of an order of the district court granting a new trial in an antitrust case which had been tried to a jury. Daiflon prevailed in that case and recovered a judgment in the amount of $2.5 million actual damages. Daiflon moved the court to treble this amount. The court simply ordered entry of judgment for $2.5 million. The trial court granted a new trial on all of the issues. *See* Exhibit A. Daiflon seeks to prohibit further proceedings except as the same are necessary in order to enter judgment on the verdict including treble damages, and to determine and assess the costs against the defendants, including attorneys' fees.

The remedy here sought is pursuant to extraordinary writ, 28 U.S.C. § 1651(a) and Fed.R.App.P. 21. Daiflon contends that the trial court's new trial order exemplified an erroneous practice likely to recur. It calls attention to the fact that the trial judge, the Honorable Luther Bohanon, had previously dismissed this case for a trivial

reason which necessitated a reversal by this court. In that instance the judge entered an order of dismissal with prejudice for failure of Daiflon to answer one discovery question. This order was vacated and the cause was reinstated by this court. *See Daiflon v. Allied Chemical Corp.*, 534 F.2d 221 (10th Cir.), *cert. denied* 429 U.S. 886, 97 S.Ct. 239, 50 L.Ed.2d 168 (1976). In essence, the petitioner contends that the trial judge has a misconception of the scope and extent of trial court's authority to grant a new trial. Daiflon's position appears to be that the judge acted on the premise that the trial court's discretion is virtually unlimited, and that because of this there exists a likelihood that there will be a repetition of the present result.

To obtain relief Daiflon must, of course, demonstrate that its right is clear and indisputable. *See Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 662, 98 S.Ct. 2552, 57 L.Ed.2d 504 (1978); *State Farm Mutual Automobile Ins. Co. v. Scholes*, 601 F.2d 1151, 1154 (10th Cir. 1979). Daiflon is required to show that the order was not only erroneous under normal standards of appellate review, but also that the ruling is so extraordinary as to evidence arbitrariness and a clear abuse of discretion.

The record here is a special one which was prepared by counsel on order of this court once it had been decided that the case should be reviewed at least to some extent. There was no transcript filed so the parties were ordered to prepare simultaneous summaries of the evidence which had been presented by each side at the trial. This was to have been in lieu of a transcript.[1] Petitioner followed the direc-

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[1] The pertinent part of our order noted that the court lacked a transcript of the evidence. In view of that, the parties were directed as follows:

> Accordingly, the parties are directed, in lieu of a transcript of the evidence, to prepare and sign a narrative statement of the case along the lines provided in Rule 10(d) of the Rules of Appellate Procedure. Each side shall prepare a summary of the evidence presented by it at the trial. These summaries

tions of the court fully. It presented a 160-page document which was fully referenced, and which complied in every detail with the court's order. It was not required to summarize the defendants' testimony at the trial and so it did not do so, with the possible exception of presenting evidence in some instances that had been brought out by Daiflon on cross-examination of defendants' witnesses. The petitioner had a right to assume that the defendants would present in summarized form the testimony of their own witnesses. The defendants' statement was relatively brief and had an argumentative tone and sought to answer petitioner's reply brief. Essentially, it was a brief and argument. Only the testimony of one witness was summarized, and that was not fully presented.[2]

The facts can be stated briefly. From 1969 to 1972, Daiflon had engaged in the business of importing refrigerant gas from Japan. The gas was repackaged by Daiflon and resold to both wholesaler and retail contractors and servicemen in the non-automotive air conditioning industry. This suit was commenced on July 12, 1972, seven years prior to the instant proceedings. The suit was brought under the Sherman Act, §§ 1 and 2, in the United States District Court for the Western District of Oklahoma. The defendants named were E. I. du Pont de Nemours & Co., Allied Chemical Corp., Kaiser Aluminum & Chemical Corp., Pennwalt Corp., Racon, Inc., and Union Carbide Corp., all of which manufactured refrigerant gas. In the suit it was alleged that the defendants had engaged in an unlawful

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shall be simultaneously prepared and shall be simultaneously submitted on or before September 11, 1979.

It was thus plain that an argumentative brief was not being sought.

[2] It did not present a summary of the evidence presented by defendants as called for. To the present day we are in the dark as to the identity of the defendants' witnesses and the testimony which was given by them.

price-fixing conspiracy, the object of which was to exclude Daiflon from the market. A further allegation was that defendants conspired to monopolize the market and that du Pont had engaged in monopolization through predatory pricing and disparagement of Daiflon's products. There was testimony presented at the trial that each of the defendants reduced their selling prices for refrigerant gas in March 1971 by 13%, and that the defendants had further reduced the selling prices of two grades of refrigerant gas in March 1972. Daiflon ceased doing business in October 1972. After the cessation of its business, defendants increased their prices to the pre-March 1971 level.

There was testimony that du Pont had approximately 45% of the market; Allied Chemical had approximately 18-20%; Union Carbide, 12-14%; Pennwalt, 8-9%; Kaiser, 7-8%; and Racon, 2%. Daiflon sold its refrigerant gas in 31 states, although its share of the market was estimated to be .5% prior to the price lowering of the defendants. There does not appear to be any quality difference in this product.

Daiflon's sales were shown to have increased after it was formed in 1969 until June 1971, at which time the price decrease of the defendants was felt and the sales of Daiflon reduced from $160,000 to $10,000 in one month. Following this, Daiflon was ordered by its bank to liquidate.

In August 1971, the President imposed a ten percent surcharge on all imported goods and thereby increased the duty on refrigerant gas from six to sixteen percent. This continued in effect until December 1971, at which time the dollar was devalued against the yen. Daiflon did not import refrigerant gas from Japan after August 1971, but sold it out of its inventory. The defendants maintained that Daiflon's failure was due to the imposition of the import surcharge and to problems in Daiflon's operations, and was not due to the defendants' actions. This was un-

doubtedly one of the primary fact issues submitted to the jury.

After trial, the trial court denied the defendants' motion for judgment notwithstanding the verdict. The judge did not formally vacate the judgment entered in favor of Daiflon on April 9 in conjunction with the grant of the new trial. No doubt this was oversight. The defendants have nevertheless filed a notice of appeal from the judgment and also from the denial of their motion for judgment notwithstanding the verdict.

It would appear from reading the transcribed oral ruling of the judge that the trial court's dissatisfaction was on the basis that the *damages* were excessive and was on the further ground that he had erred in the admission of unidentified exhibits.

The trial court's main disagreement was with the amount of the verdict. The judge stated in connection with the new trial order that the amount of the award shocked him, and the indications were that he would have been even more shocked had he ordered the trebling of the damages. The judge had much less to say about the jury's conclusion that the defendants were liable under the antitrust laws. The main complaint here was that there was not enough time and effort given to determining the authenticity of the documents that were received in evidence, and he expressed a determination to consider them with much greater care on retrial. At the same time he did not point out any single document or group of documents which should not have been received.

Discussion of the Issues

The primary question in the case is whether, in view of the fact that final judgment or final order is not from a practical standpoint present in the record, and hence there is not an adequate remedy at law, an extraordinary writ

can be employed to review the validity of the order of the trial court granting a new trial.

In our opinion the trial court merely overlooked formal vacating of the judgment, and therefore we must assume that this intended object was carried out since the new trial was ordered.

The defendants take the position that there is *no* remedy under an extraordinary writ. The only possibilities, according to them, are, first, to grant their motion for judgment notwithstanding the verdict, or, second, to retry the case. Defendants do not give recognition to possible use of the writ on the basis of "a clear abuse of discretion, an abdication of the judicial function, or the usurpation of judicial power." *Paramount Film Distributing Corp. v. Civic Center Theater, Inc.*, 333 F.2d 358, 361 (10th Cir. 1964), *citing La Buy v. Howes Leather Co.*, 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed.2d 290 (1957). The truth is that the extraordinary remedy route is limited, but it cannot be said to be nonexistent.

We take note of the fact that there has been no certification pursuant to 28 U.S.C. § 1292(b). This interlocutory appeal procedure was not a viable possibility. Defendants suggest that Daiflon should have sought to oust the judge by means of §§ 144 and 455 of the Judicial Code on the basis of an affidavit that he was biased and prejudiced. This procedure has not been pursued by the petitioner as of the present time at least, and there is nothing in the record which indicates that such a course had been contemplated.

It goes without saying that an orthodox appeal pursuant to § 1291 of the Judicial Code is not a possibility because, as indicated above, there is no final judgment or final order which could support an appeal. The grant of a new trial is not a final judgment.[3]

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[3] *See Kanatser v. Chrysler Corp.*, 199 F.2d 610, 615 (10th Cir. 1952), *cert. denied* 344 U.S. 921, 73 S.Ct. 388, 97 L.Ed. 710 (1953).

A valid basis for obtaining appellate review is somewhat elusive. Thus, this is not a question of the trial court's acting beyond its *jurisdiction.* This is a recognized exception to the final judgment rule.[4] What we are confronted with is a request for extraordinary review questioning whether there has been a clear abuse of discretion in granting the new trial. So, the lack of jurisdiction remedy is out.

There is a concept of finality which had a practical and nontechnical construction.[5] It is, however, no longer a viable theory. *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978). The concept of piecemeal review has rendered the death knell threat practically ineffectual.

General Issuance of a Writ of Mandamus as an Instrument of Appellate Review

The only remaining alternative is therefore whether there is some inherent basis to be found within the four corners of the writ of mandamus. We proceed to that inquiry.

The relevant statute, 28 U.S.C. § 1651(a), is not itself narrow and restrictive. It provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

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[4] *Demeretz v. Daniels Motor Freight, Inc.*, 307 F.2d 469 (3d Cir. 1962).

[5] *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 171, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974); *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964).

So, then, it is a question whether the circumstances here are agreeable to the usages and principles of law.

Perhaps the area which offers a possibility for review is supervisory use of the writ of mandamus in accordance with *La Buy v. Howes Leather Co.*, 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed.2d 290 (1957), and *Schlagenhauf v. Holder*, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964). *See generally* 16 C. Wright, A. Miller, E. Cooper, E. Gressman, Federal Practice & Procedure § 3934 (1977); Note, *Supervisory and Advisory Mandamus under the All Writs Act*, 86 *Harv.L.Rev.* 595 (1973). The supervisory aspect of mandamus has indeed been used in order to review the granting of a new trial.[6] However, the decisions reveal great reluctance to employ it even for the purpose of supervision.[7]

Little encouragement for use of writs is to be derived from the Supreme Court decisions even for supervisory purposes, although the Supreme Court has approved its use to review interlocutory orders where the judge being supervised has "displayed a persistent disregard of the [Federal] Rules of Civil Procedure" so as to justify exercising supervisory authority to control his conduct,[8] or to confine the trial court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. *See Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 63 S.Ct. 938, 87 L.Ed. 1185 (1943). *Roche* emphasized that mandamus is to be used to aid appellate jurisdiction by removal of obstacles to an appeal but not as a substitute for the appeal procedure pre-

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[6] *Grace Lines, Inc. v. Motley*, 439 F.2d 1028 (2d Cir. 1971).

[7] *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 98 S.Ct. 2552, 57 L.Ed.2d 504 (1978).

[8] *Will v. United States*, 389 U.S. 90, 96, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967); *La Buy v. Howes Leather Co., supra. See also United States v. Smith*, 331 U.S. 469, 67 S.Ct. 1330, 91 L.Ed. 1610 (1947).

scribed in § 1291. Of course there must be no adequate means at law for gaining review.[9] The petitioner has the burden of showing that his right to the writ is "clear and indisputable." [10]

Hardship and inconvenience standing alone are, of course, insufficient under the *Roche* doctrine. This is not to say that cost and inconvenience to the petitioner involved in retrying the case, repreparing it and rediscovering evidence are not entitled to any consideration, but these burdens must be in conjunction with misuse of process or authority in order to outweigh the roadblock based upon the policy of avoiding piecemeal review.[11] In *Bankers Life & Casualty Co. v. Holland,* 349 U.S. 379, 383, 74 S.Ct. 145, 98 L.Ed. 106 (1953), it was emphasized that the review that is possible pursuant to extraordinary writs is to be used only in exceptional cases involving a clear abuse of discretion or usurpation of judicial power. The Supreme Court there refused to review by extraordinary writ.

In *La Buy v. Howes Leather Co.,* 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed.2d 290 (1957), the holding condemned the surrender by the district court of the power to try the case before it. The use of an unsupervised master to carry out the entire trial was condemned. The abdication by the judge of his official function was held to be a clear abuse of discretion. The recognition given to the scope of the writ in *La Buy* and in the Supreme Court's decision in *Schlagenhauf v. Holder,* 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964) (mandamus used to enforce Rule 35(a) of the Rules

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[9] *Kerr v. United States District Court,* 426 U.S. 394, 403, 96 S.Ct. 2119, 48 L.Ed.2d 725 (1976).

[10] *Will v. Calvert Fire Ins. Co.,* 437 U.S. 655, 662, 98 S.Ct. 2552, 57 L.Ed.2d 504 (1978); *Bankers Life & Casualty Co. v. Holland,* 346 U.S. 379, 384, 74 S.Ct. 145, 98 L.Ed. 106 (1953).

[11] *United States Alkali Export Ass'n v. United States,* 325 U.S. 196, 202, 65 S.Ct. 1120, 89 L.Ed. 1554 (1945).

of Civil Procedure), do serve as guides to supervisory use of the writ.[12] *Will v. United States,* 389 U.S. 90, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967), contained some slight enthusiasm for use of the writ. It said that such writs may serve "a vital corrective and didactic function" in the federal judicial system. 389 U.S. at 107, 88 S.Ct. at 280.

Generally, the more recent cases tend to tighten the restrictions. *See Kerr v. United States District Court,* 426 U.S. 394, 96 S.Ct. 2119, 48 L.Ed.2d 725 (1976), and *Will v. Calvert Fire Ins. Co.,* 437 U.S. 655, 98 S.Ct. 2552, 57 L.Ed. 2d 504 (1978). The *Will* case was a plurality decision in which the main opinion was by Mr. Justice Rehnquist. It reversed a Seventh Circuit decision granting a writ of mandamus to overturn a district court's stay of federal court proceedings pending the completion of state court litigation. It was held that the determination as to whether to defer to state court proceedings rested in the discretion of the district court, and in such circumstances a litigant's right to the writ was not considered to be clear and indisputable. Plain abuse of discretion or abuse of power which add up to mere erroneousness was said not to furnish a basis for interlocutory review by writ. Justice Blackmun specially concurred in the Rehnquist opinion. The Burger, Brennan, Marshall and Powell dissent maintained that the clear abuse of discretion standard set forth in *La Buy* was still a valid basis for issuance of a writ of mandamus.

Granted that erroneousness does not constitute a valid ground for issuance of the writ. Nevertheless, it cannot be said that the clear abuse of discretion standard is repudiated. So, therefore, if it is found that there is a disregard for proper procedure, or misuse of judicial power in the

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[12] *See generally* 16 C. Wright, A. Miller, E. Cooper, E. Gressman, Federal Practice & Procedure §§ 3934-35 (1977); Note, *Supervisory and Advisory Mandamus under the All Writs Act,* 86 *Harv.L.Rev.* 595 (1973).

trial judge's conduct, this would constitute a clear abuse of discretion.

If it is found that there was plain or clear error in the judge's evaluation of the facts and that the granting of a new trial was gross or excessive to the extent that it is extraordinary, it would seem that vacating the order granting the new trial would be permissible.

The Tenth Circuit Cases on Use of the Writ for Review

In the Tenth Circuit the extraordinary writs have been used where there has been a clear abuse of discretion or where the right to relief is clear and indisputable.[13]

In *Erie v. United States District Court,* 362 F.2d 539 (10th Cir. 1963), *overruled on other grounds, Liberty National Bank & Trust Co. v. Acme Tool Div., Rucker Co.,* 540 F.2d 1375 (10th Cir. 1976), the element of hardship to the petitioner was present. Relief was not granted on that basis. *Usery v. Ritter,* 547 F.2d 528, 532 (10th Cir. 1977), approved use of mandamus for the purpose of reviewing a district court's discovery order which had compelled the Secretary of Labor to reveal the identity of informants in an action involving violation of the equal pay provisions of the Fair Labor Standards Act. In *Bruce v. Bohanon,* 436 F.2d 733 (10th Cir. 1970), *cert. denied sub nom. Marathon Oil Co. v. Bruce,* 403 U.S. 918, 91 S.Ct. 2227, 29 L.Ed.2d 694 (1971), a writ of mandamus was issued for the purpose of reviewing a pretrial order of the district judge which had provided that certain of the claims be tried to a jury and others to the court. Plaintiff

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[13] *State Farm Mutual Automobile Ins. Co. v. Scholes,* 601 F.2d 1151, 1154 (10th Cir. 1979); *Usery v. Ritter,* 547 F.2d 528, 532 (10th Cir. 1977); *Prop-Jets, Inc. v. Chandler,* 575 F.2d 1322, 1324 (10th Cir. 1978); *Paramount Film Distributing Corp. v. Civic Center Theater, Inc.,* 333 F.2d 358, 361 (10th Cir. 1964); *Pet Milk Co. v. Ritter,* 323 F.2d 586, 588 (10th Cir. 1963).

had filed a timely demand for jury trial on all issues. This, of course, was a classic use of the mandamus in a supervisory way.

There are other instances in which our court refused to review interlocutory orders in the absence of a showing of clear abuse of discretion or abdication of judicial function. *See State Farm Mutual Automobile Ins. Co. v. Scholes*, 601 F.2d 1151 (10th Cir. 1979); *Prop-Jets, Inc. v. Chandler, supra; Paramount Film Distributing Corp. v. Civic Center Theater, Inc., supra; Pet Milk Co. v. Ritter, supra.*[14]

On only two occasions have we considered issuance of the writ in order to review the trial court's granting of a new trial. One of these was *Kanatser v. Chrysler Corp.*, 199 F.2d 610 (10th Cir. 1952). The order in that case was entered on grounds other than those contained in the motion for new trial. Also, the order granting new trial was out of time (six months). Thus, there was a question of jurisdiction as well as a question of failure to observe the

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[14] The other circumstances in which this court has ruled on the propriety of granting or denying extraordinary relief involved the more traditional function of the writ "to confine an inferior court to lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority . . .." *Roche v. Evaporated Milk Ass'n, supra*, 319 U.S. at 26, 63 S.Ct. at 941. *E.g., Estate of Whitlock v. Commissioner*, 547 F.2d 506 (10th Cir. 1976), *cert. denied* 430 U.S. 916, 97 S.Ct. 1329, 51 L.Ed.2d 594 (1977) (mandamus issued to order Tax Court to comply with previously issued Tenth Circuit mandate); *Breckenridge Lands, Inc. v. Sabo*, 376 F.2d 840 (10th Cir. 1967) (denied writ to review new trial order entered within district court's jurisdiction); *Erie v. United States District Court*, 362 F.2d 539 (10th Cir. 1963), *overruled on other grounds, Liberty National Bank & Trust Co. v. Acme Tool Div., Rucker Co.*, 540 F.2d 1375 (10th Cir. 1976) (mandamus issued to compel district court to dismiss counterclaim filed in interpleader action); *Kanatser v. Chrysler Corp.*, 199 F.2d 610 (10th Cir. 1952), *cert. denied* 344 U.S. 921, 73 S.Ct. 388, 97 L.Ed. 710 (1953) (granted writ to review new trial order made on grounds outside trial court's jurisdiction); *Tuggle v. Chandler*, 199 F.2d 86 (10th Cir. 1952) (extraordinary relief denied as premature).

procedural rules. Also, the trial court stated that it was not going to permit a verdict which exceeded $15,000 to stand. Thus, the circumstances of the Kanatser case displayed an arbitrariness that strongly recommended the supervisory writ. *Breckenridge Lands, Inc. v. Sabo,* 376 F.2d 840 (10th Cir. 1967), is one in which this court denied relief in the new trial situation. In that case there was a lack of any showing of judicial misconduct or clear abuse of authority.

Consideration of the Cases From Other Circuits in Which Review of Orders Granting a New Trial Was Sought by Use of an Extraordinary Writ

From an examination of the decisions of the various circuits in which extraordinary relief was sought to review orders granting new trial, it would appear that in the majority of the cases writs were denied.[15]

In each of the cases that are cited below the court sought to find extraordinary circumstances capable of justifying issuance of the writ. In the absence of extraordinary circumstances it was held that the general principle controlled that extraordinary writs cannot be used as substitutes for the appellate process.[16]

In *General Motors Corp. v. Lord,* 488 F.2d 1096 (8th Cir. 1973), the Eighth Circuit enumerated some circum-

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[15] *General Motors Corp. v. Lord,* 488 F.2d 1096 (8th Cir. 1973); *Pat Ryan & Assoc., Inc. v. Dupree,* 17 F.R.Serv.2d 192 (4th Cir. 1973) (unpublished opinion); *Thorn v. Parkland Chevrolet Co.,* 416 F.2d 95 (4th Cir. 1969); *Breckenridge Lands, Inc. v. Sabo,* 376 F.2d 840 (10th Cir. 1967); *Benton Harbor Malleable Industries v. International Union, United Automobile, Aircraft and Agricultural Implement Workers,* 355 F.2d 70 (6th Cir. 1966); *Bigart v. Goodyear Tire & Rubber Co.,* 361 F.2d 317 (2d Cir. 1966).

[16] *General Motors Corp. v. Lord, supra,* 488 F.2d at 1099; *Benton Harbor Malleable Industries v. International Union, etc., supra,* 355 F.2d at 72-73.

stances where review by mandamus is proper. They are as follows:

First, extraordinary circumstances may be present when the district court's order was entered without the court having jurisdiction. *Roche v. Evaporated Milk Ass'n,* 319 U.S. 21, 26, 63 S.Ct. 938, 87 L.Ed. 1185 (1943).

Second, extraordinary circumstances may be present where the order under attack is characteristic of an erroneous practice which is likely to recur. *See, e. g., La Buy v. Howes Leather Co.,* 352 U.S. 249, 258, 77 S.Ct. 309, 1 L.Ed.2d 290 (1957); Note, *Supervisory and Advisory Mandamus under the All Writs Act,* 86 *Harv.L.Rev.* 595, 610 (1973).

Third, where the order under attack presents a novel and important question in which there is a need for guidelines which would, if set forth, be useful for the resolution of similar cases. *See Schlagenhauf v. Holder,* 379 U.S. 104, 111-12, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964); Note, *Supervisory and Advisory Mandamus under the All Writs Act, supra,* 86 *Harv.L.Rev.* at 618-19.

The Eighth Circuit recognized the obvious general rule which is that the grant of a new trial is insufficient without more to justify the use of the writ. We are, of course, constantly aware of that. The second standard set forth above, namely that of the presence of extraordinary circumstances where the order under attack is characteristic of an erroneous practice likely to recur, is the basis on which the petitioner seeks relief in the present case.

There are very few cases in which an extraordinary writ has been approved for the purpose of reviewing orders granting a new trial (only three to be exact). These are *Peterman v. Chicago, Rock Island & Pacific Railroad Co.,* 493 F.2d 88 (8th Cir. 1974), *cert. denied* 417 U.S. 947, 94 S.Ct. 3072, 41 L.Ed.2d 667 (1974); *Grace Lines, Inc. v. Motley,* 439 F.2d 1028 (2d Cir. 1971); and *Kanatser v.*

Chrysler Corp., 199 F.2d 610 (10th Cir. 1952), *cert. denied* 344 U.S. 921, 73 S.Ct. 388, 97 L.Ed. 710 (1953).

In *Peterman*, the court ordered a new trial sua sponte and did so outside of the ten-day time limitation provided in Federal Rules of Civil Procedure 59(d).

In *Kanatser*, this court ordered a new trial on grounds which were not stated in the motion six months after entry of judgment.

The third case, *Grace Lines, Inc. v. Motley, supra*, exemplifies the second extraordinary circumstance set forth in *Lord*, namely the use of supervisory mandamus. In *Grace Lines* the trial court had ordered a new trial three days after declaring a mistrial. Thus, there was misuse of the Rules of Civil Procedure which precluded the use by the defendants of Fed.R.Civ.P. 50(b) for judgment notwithstanding the verdict, which constituted a violation by the trial court of Rule 50(b). The Second Circuit determined that it was an appropriate case for review. The writ of mandamus was used to reinstate the jury verdict.

United States v. Smith, 331 U.S. 469, 67 S.Ct. 1330, 91 L.Ed. 1610 (1947), was relied on by the Second Circuit in *Grace Lines, Inc.* In the *Smith* case the Supreme Court held that mandamus was proper to vacate an order for new trial which was made in violation of the Federal Rules of *Criminal* Procedure.

The opinion of the Second Circuit in *Grace Lines* contains a summary of the scope of the appellate court supervisory authority under the All Writs Act. The conclusion reached was that ordinarily the order granting a new trial must await the entry of a final judgment following a new trial.[17] The Second Circuit went on to say that the purpose of the All Writs Act, 28 U.S.C. § 1651, is to allow the

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[17] Unless, of course, the trial judge is dissatisfied with the verdict and orders another new trial.

appellate courts to review by mandamus non-appealable interlocutory orders which would be the subject of appeal from a final judgment.

The *Grace Lines* court explained that supervisory mandamus is not to be used to authorize indiscriminate use of prerogative writs as a medium for reviewing interlocutory orders. The court concluded that "Mandamus will lie, in the sound discretion of the appellate court, where the trial court has exceeded or wrongfully refused to exercise its judicial power or has committed a clear abuse of discretion * * * * [I]n such cases the desirability of present review outweighs the policies which confine appeals to the review of final orders." 439 F.2d at 1031 n. 2.

It is important to notice that the cases in which relief has been granted involved errors of law rather than fact. For example, where the order for new trial was granted on the basis that damages were excessive, mandamus has been denied. *Pat Ryan & Assoc., Inc. v. Dupree,* 17 F.R. Serv.2d 192 (4th Cir. 1973). *See also Benton Harbor Malleable Industries v. International Union, etc.,* 355 F.2d 70 (6th Cir. 1966).

In summary, in order to grant relief an appellate court must find not only that the trial judge's grant of a new trial was erroneous, but also that the judge's conduct of the litigation was such as to raise a conclusion that the judge clearly abused his discretion and that appeal is not an adequate remedy under the circumstances.

Is the Posture of This Case Such That a Writ Should Issue?

Stated differently, does the record establish that the grant of the new trial was not only erroneous but indeed served to demonstrate such a clear abuse of trial court discretion that statutory appeal would not be an adequate remedy under the circumstances.

In our view the question whether the writ should issue and the question of entitlement to relief are intermingled. Thus, if the proof is sufficient to justify the issuance of the writ, the question whether there is entitlement to relief will have been determined.

The questions are hard and the answers are also difficult. The retrial will be even more difficult inasmuch as a new round of discovery is contemplated by the trial court. There is reason to believe that the trial judge was somewhat dissatisfied with the presentation which was made by the defendants and that he felt that this should be changed in the event of a second trial.

The judge is, of course, not in a position of advocacy and if he does hold the view (and this has to be read between the lines) that the court should encourage the development of the defendants' case, he would be acting outside of and beyond the authority. The fact that one side was not prepared to the extent that the court felt it ought to have been is not a basis for the grant of a new trial.

The trial court's rulings and comments on defendants' motion for judgment notwithstanding the verdict and new trial are appended hereto, and these comments are cogent evidence to be considered in making the present determination. These comments of the trial judge were made on May 14, 1979, following the arguments on motion for new trial. At that time the court emphasized that it had only one object and that was to see that the parties had a fair trial. The judge proceeded to conclude that a judgment notwithstanding the verdict in accordance with the motion of the defendants could not under any circumstances be granted. The court added: "It would not fit this case at all." At the same time the judge concluded that the jury verdict had to be vacated and that a new trial had to be granted. The reasons given were, first, that counsel for the plaintiff was an exceedingly good lawyer and able to

make a lot out of things that really had no importance. The court said that Mr. Crawford had the jury in the palm of his hand almost from the beginning and that the defendants were put at a great disadvantage because they did not know what the plaintiff's evidence was going to be. The court said that the defendants had opened their files completely and yet were kept in the dark as to the parts of the files that the plaintiff would select and use. The court expressed dissatisfaction with the method for passing on the authenticity of the exhibits.

The judge continued that although he had complete appreciation for the work of the jury, the jury needed to be, and apparently was not, apprised of the magnitude of the problems inasmuch as the issues were foreign to them (and perhaps beyond their comprehension). From this it was concluded that there was not a fair trial. His main reason is stated as his next point in the informal findings, that the verdict of $2.5 million indeed was excessive inasmuch as the original capital investment was only $200,000. It should be said at this time that the trial court was not correct in this statement because the actual initial capital was $300,000 together with a very substantial line of credit amounting to approximately $500,000. The court said that the defendants had a perfect right to meet competition. At the same time the judge said that Daiflon was insignificant.

The judge went back to the damages and said: "What are the actual damages? There is nowhere it reaches two and a half million dollars." The judge was also depressed about having to treble the amount of the damages. On this he said: "Well, here is what the court is going to do. The Court grants a new trial; and we are going to have a conference where every exhibit to be used by either side will be passed on before we ever call a jury." Actually this procedure was followed in the proceedings before us, but undoubtedly from what the judge said it was not pursued

to the full satisfaction of the trial court. In any event, he was looking forward to a conference for the purpose of reconsidering the admissibility of all exhibits and for the purpose of examining the depositions that are to be read to the jury. On this it should be added that this information was fully communicated to the defendants and was available to the court. It is not up to the litigants to guarantee that everybody who is interested will read this material before trial.

The trial court also mentioned that some of the exhibits which were admitted had been erroneously received. It is important to mention, however, that the judge does not specify as to which of these were improperly received and there is no way to ascertain this. He spoke of proofs of papers "in the usual course of business, a lot of them were never identified by the custodian. A lot of them were not proved. They were just thrown in evidence." The court concluded, "Well, the court is absolutely not satisfied with it. The verdict of the jury, the Court was shocked when the verdict was read of $2,500,000 based upon the evidence before that jury, just does not justify that kind of a verdict."

It is thus apparent that it is the amount of the verdict rather than any other factor which caused the judge to enter the order for new trial. From an examination of the trial court's comments it is to be concluded that there is no rational basis furnished for granting a new trial other than the magnitude of the verdict.

As far as liability is concerned, the judge indicated his belief that it was established. If he had doubts about this, he would have granted the defendants' motion for judgment notwithstanding the verdict. This was a subject on which he was positive. He said that this would not be appropriate under any thinking or analysis. On the subject of liability, this is not a case in which the evidence

to establish liability is vague and questionable. The evidence supported the conclusion that the several defendants engaged in a "buccaneering" scheme designed to eliminate the plaintiff as a contender. To be sure, Daiflon's market share was relatively small, but the price manipulation and the timing lends itself to the interpretation that elimination of Daiflon was an object of the conspiracy. Defendants lowered their prices by 13%, thus foregoing susbtantial profits.

None of the trial judge's comments were directed to inadequacy of the evidence to establish the conspiracy that is charged. Instead the burden of the trial court's discussion was on the magnitude of the judgment and the deficiency of evidence to support it. From the record before the court, which admittedly is not a full record, it is not clear that the evidence was insufficient to satisfy the $2.5 million verdict. However, the cases teach us that subject only to the limitation of the Seventh Amendment the trial court's discretion is most full and complete when the court is considering a factual question such as damages. *Richardson v. Communications Workers of America,* 530 F.2d 126, 129 (8th Cir.), *cert. denied* 429 U.S. 824, 97 S.Ct. 77, 50 L.Ed.2d 86 (1976); *Brown v. Richard H. Wacholz, Inc.,* 467 F.2d 18 (10th Cir. 1972).

This court is, in view of this, unwilling to vacate the trial court's determination based on possible erroneous premises which the court entertained on the damages issue, because the trial court did hear the evidence in its entirety and hence it is in a much better position to judge this issue than is an appellate court.

We take a different view, however, of the issue of the liability of the defendants, and we point out that as to this element the trial court has given no reason to indicate that the record evidence was insufficient or that the jury acted erroneously in making its determination as to lia-

bility. The trial judge offered no rational basis for invalidating the jury verdict in its entirety. He pointed out no particular error in law or in the receipt of evidence. He appeared to have ordered a new trial primarily because he was shocked at the size of the verdict. By so doing, the trial court invaded the province of the jury as the primary trier of fact, *cf. Moore v. Shultz,* 491 F.2d 294 (10th Cir.), *cert. denied* 419 U.S. 930, 95 S.Ct. 203, 42 L.Ed.2d 161 (1974), and interfered with Daiflon's right to a jury trial under the Seventh Amendment.

> [I]t has long been the rule that a trial judge should not act merely as a "13th juror" and set a verdict aside simply because he would have reached a different result had he been the trier of fact. Rather, the judge's duty is to exercise a more limited judicial discretion. . . . A trial judge is not to interfere with the verdict, "unless it is quite clear that the jury has reached a seriously erroneous result."

Borras v. Sea-Land Service, Inc., 586 F.2d 881, 887 (1st Cir. 1978).

In summary and conclusion:

Despite the narrowness of the exception which allows appellate review on extraordinary writ of orders granting new trial, we are convinced that a case has been made here for review by supervisory mandamus on the issue of liability of the defendants to the plaintiff-petitioner. As we have stated above, we take a different view of the issue of damages, even though the trial judge went forward on some misconception as to some of the facts. The question of damages *is* one of fact, and the cases hold that the trial court has more discretion in this area than in the area of liability, which involves a question of or questions of law.

Therefore, it is our judgment, and it is so ordered, that the trial court shall restore the verdict of the jury as to liability of the defendants. The trial court shall therefore reinstate the verdict insofar as it determines the several defendants to be liable. Since we are granting a new trial as to damages, the trial court shall proceed to try that part of the case. The plaintiff should be allowed to bring to the attention of the jury all of those matters that have been previously presented on liability that would have an effect on damages. It does not appear to be necessary to re-present this evidence. Most of it can be read to the jury or the jury could be allowed to see or read exhibits.

The trial court has previously commented on the need for organizing the evidence prior to further proceedings, and we do not wish to curtail this activity, but it is our view that insofar as possible, redetermination of issues already decided should be avoided so that the actual trial shall be as simple as possible. We repeat, that evidence which is relevant and material to the issues, including that evidence which reveals the nature of the activity of the defendants which caused the damage, and on the other side that evidence of the defendants which tends to mitigate the damages, should be fully presented.

The one particular part of the evidence which Daiflon claims it was prevented from developing and which appears to be relevant is that which concerned Daiflon's plans to construct a domestic refrigerant gas manufacturing facility. The court should carefully consider the bearing which this evidence might have on the measure of damages, and if it is shown to have relevance, it should be received. *See Wood Exploration & Production Co. v. Aluminum Co. of America,* 509 F.2d 784 (5th Cir. 1975).

The writ of mandamus shall therefore issue in accordance with the views set forth in the foregoing opinion.

Exhibit "A"

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 72-483-B (Civil)

DAIFLON, INC., *Plaintiff*,

vs.

ALLIED CHEMICAL CORPORATION, et al, *Defendants*.

May 14, 1979

Court's Rulings and Comment on Defendants' Motions for Judgment N.O.V. and for New Trial

BOHANON, District Judge.

THE COURT: Well, the Court concludes that counsel have concluded your arguments.

Needless to say, the Court has struggled long and with difficulty over the Court's problem. You lawyers think you have problems. I was a lawyer a long time, and you do have problems. I used to think the courts didn't have any problems. They just sat there and took care of those matters like water off of a duck; but it isn't true. You stay awake. You work. You worry.

The Court has one object and only one object, and that is to see that the parties have a fair trial. No other object, no other interest, and no other concern.

I have reviewed all of the briefs, reviewed the file, and studied and analyzed the case as the evidence came forward.

The Court has concluded that the Court cannot, under any circumstances, grant judgment NOV, it just would not fit this case at all.

The Court further concludes and holds that the Court must vacate, and does vacate, the jury verdict.

The Court must and does grant a new trial.

I say this to you, Mr. Crawford, you are an exceedingly good lawyer, and you make a lot out of things that are really not important, as I view it from this evidence; but you had this jury in the palm of your hand almost from the beginning.

The Court finds and holds that the defendants were put at a great, great disadvantage, when you march into court on the day of trial, and I believe it was on Friday, and the time before the trial the defendants were complaining about not knowing what your evidence was going to be, what your documents were going to be.

Now the Court ordered the defendants, and they worked with you in good faith, and they opened their bowels and bared their chest and you got out of their files literally hundreds of exhibits. They were kept in the dark as to which ones of these you were going to use until Friday before the trial, and then the Court made certain orders, and we started the trial with literally dozens and dozens of exhibits that were not agreed to; and the Court had been open during all this period of time, after it came back, for the purpose of settling any issue; and the defendant came to me and said, "We are not getting this, we are not getting that out of the plaintiff, and what these exhibits are going to be."

The pretrial order was pretty plain: Everyone would know exactly what exhibits would be offered and what would not be offered.

Then the question of whether or not they were competent was never tried. We started this case with the defendant in the dark, and the Court in the dark; and the failure to get together on these exhibits put an exceedingly hard load on this Court, to say "This is in; this is out." And try the case day to day, hear the evidence, the Court gets tired just like lawyers do.

When the Court goes home at night, we can't do much more than say, "Well, I'm tired. I've got to go to sleep, get some rest for the next day's work" And that's what happened.

The Court has full and complete appreciation for the work of the jury in this case, and full regard for their stability in the solving of problems of this kind; but notwithstanding this appreciation and deep regard and concern with the work of the jury, the jury in order to do their functions must be adequately apprised of the tremendous problems. These kinds of cases are not easy cases, and particularly not easy for jurors where the issues are completely foreign to them. They don't understand about this gas business. After weeks of work they get to where they do.

The Court finds that there was not a fair trial, and this Court has a duty to see that there is a fair trial. The Court has no love for the defendants and no love for the plaintiffs in this case, but there was not a fair trial, say from beginning to end.

The Court would be less than honest if the Court let this verdict stand. The Court would be somewhat of a coward to let this verdict stand, under all of the evidence and all of the things that happened before and during the trial of the case.

Furthermore, the Court would be exceedingly lazy if he let it stand and refused to try the case again. It's a lot of work. The Court could easily say, "Well, let the verdict stand," and get out of the work; but this is not my duty. It's work. Of course it's work, but the Court must shoulder its responsibility as long as I sit on the bench.

When you consider the verdict, two and a half million dollars—when you consider that this company started out with a capital investment of $200,000 to get into a business that runs into the millions, it would be just like

me going out here and saying, "I'm going to go into the oil business, and I'm going to get a block and drill a well, on $100,000."

Why, you couldn't even get started.

The $200,000 that the plaintiff had wasn't enough to really get them started into breaking into this business, as long as the defendants were concerned about their business.

The defendants had a perfect right to meet competition, and for them not to meet competition is to deny them free enterprise.

This is what they did in places, but they did it in rare places, in Alabama, Houston, maybe in Oklahoma City—some little places where they met competition, but generally Daiflon was insignificant; and the Japanese treatment by this country, the surtax, and the exchange of the dollar —this had a tremendous amount of effect upon what happened to this plaintiff.

You can consider the earnings, 1969, 1970, 1971. If you consider the earnings, 1969, 1970, 1971, there is no basis upon these earnings by the company to project that they lost $2,500,000. Their earnings during these years were insignificant to say that builds into a judgment, a verdict, of two and a half million dollars.

What are the actual damages? There is nowhere it reaches two and a half million dollars.

Now the Act provides that where you find a conspiracy, and it is operation, why, for punishment the Court adds, triples it; but you can't say there's two and a half million dollars in damages from the years 1969- 1970 and 1971 operation.

Well, here is what the Court is going to do. The Court grants a new trial; and we are going to have a conference

where every exhibit to be used by either side will be passed on before we ever call a jury.

I am going to take time. We are going to have a conference. We can't have it this month. I don't think we can have it next month. I am moving my quarters right away up to the Fifth Floor, and I'll have in the future the Circuit court room up there; but I am going to set a date and a time when it is reasonably agreeable to counsel, and we are going over every exhibit. We are going to match it with the rules of evidence, and if it is admissible, we are going to put it over here; if it is not admissible we are going to put it over here, so to speak. These that are admissible, would be admitted. There will be no argument before the jury. There will be no time delay. There will be no headaches for the Court to pass upon as to what exhibits are to be received in evidence and what are not to be received in evidence.

Those that are to be received in evidence, and the depositions that are to be reread to the jury, we will know what they are and know where we are going from the very beginning.

Now I assume that the parties may, but I am going to ask now, do the parties want any further discovery, and if so, how much time do you want for discovery, or do you want to think about it and talk to the Court about it a little later on—a period of discovery. We are going to have a fixed time for further discovery.

I think perhaps we should either pass upon the great volume of exhibits before we go into further discovery, or vice versa. I don't know which would be the best—whether the egg before the chicken or the chicken before the egg; but you've got to have some discovery.

Some of these exhibits that the Court admitted, the Court erred in it. We erred seriously, and we erred because of the pressure that was put on the Court to conduct

a trial and to pass two hundred, three hundred exhibits, and the right to be admitted or not was wholly unfair to the Court. Just not fair to the Court. I sat here in this court room. We spent two hours passing on exhibits, and by the flip of the thumb I said, "This is in" and "This is not." I didn't know what I was talking about, because whether or not these exhibits come within the pale of the rule or not, why, there is no proof to show it.

These proofs of papers in the usual course of business, a lot of them were never identified by the custodian. A lot of them were not proved. They were just thrown in evidence.

It is not every piece of paper that you get out of a defendant's file that's admissible just because it has some inference about some question.

Well, the Court is absolutely not satisfied with it. The verdict of the jury, the Court was shocked when the verdict was read of $2,500,000 based upon the evidence before that jury, does not justify that kind of a verdict.

So does anyone have anything further to say? As quick as I can get settled down, why the Court will give you notice and we will begin shaping this case so that we can have a trial that the Court can say is and was a fair trial. The verdict may be more under new evidence than that allowed. It may be less. I don't know, don't care; but I will know in my own mind that there was a fair trial, and that these exhibits will not be a headache to the defendant, they will not be a headache to the Court. We can hear the evidence and let the jury hear the story, or the arguments and evidence on both sides.

If anyone has anything further to say, the Court will hear you. Otherwise we will take a recess until further notice through the Clerk.

(The proceedings are adjourned.)

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

November Term—December 21, 1979

DAIFLON, INC., *Petitioner,*

vs.

THE HONORABLE LUTHER BOHANON, Judge of the United States District Court for the Western District of Oklahoma, *Respondent.*

JUDGMENT AND WRIT OF MANDAMUS

No. 79-1459

(D.C. No. CIV 72-C-483-B)

Before The Honorable Robert H. McWilliams, Circuit Judge, The Honorable Jean S. Breitenstein, Circuit Judge, and The Honorable William E. Doyle, Circuit Judge

This cause came on to be heard on the narrative statements of the case filed by petitioner and respondent along lines provided in Rule 10(d) F.R.A.P. pursuant to order of court as a result of a petition for writ of mandamus and/or Writ of Prohibition seeking review of an order of the United States District Court for the Western District of Oklahoma granting a new trial in an antitrust case which had been tried to a jury. The cause was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of the trial vacating the verdict of the jury as to liability of the several defendants is reversed and that the writ of mandamus shall issue:

Therefore, it is our judgment, and it is so ordered, that the trial court shall restore the verdict of the jury as to liability of the defendants. The trial court shall therefore reinstate the verdict insofar as it determines the several defendants to be liable. Since we are granting a new trial as to damages, the trial court shall proceed to try that part of the case. The plaintiff should be allowed to bring to the attention of the jury all of those matters that have been previously presented on liability that would have an effect on damages. It does not appear to be necessary to re-present this evidence. Most of it can be read to the jury or the jury could be allowed to see or read exhibits.

The trial court has previously commented on the need for organizing the evidence prior to further proceedings, and we do not wish to curtail this activity, but it is our view that insofar as possible, redetermination of issues already decided should be avoided so that the actual trial shall be as simple as possible. We repeat, that evidence which is relevant and material to the issues, including that evidence which reveals the nature of the activity of the defendants which caused the damage, and on the other side that evidence of the defendants which tends to mitigate the damages, should be fully presented.

The one particular part of the evidence which Daiflon claims it was prevented from developing and which appears to be relevant that which concerned Daiflon's plans to construct a domestic refrigerant gas manufacturing facility. The court should carefully consider the bearing which this evidence might have on the measure of damages, and if it is shown to have relevance, it should be received. *See* Wood Exploration & Production Co. v. Aluminum Co. of America, 509 F.2d 784 (5th Cir. 1975).

The writ of mandamus shall therefore issue in accordance with the views set forth in the foregoing opinion.

/s/ Howard K. Phillips,
Howard K. Phillips, *Clerk*

APPENDIX C

January Term—March 5, 1980

No. 79-1459

DAIFLON, INC., *Petitioner,*

vs.

THE HONORABLE LUTHER BOHANON, Judge of the United States District Court for the Western District of Oklahoma, *Respondent.*

Before Honorable Oliver Seth, Chief Judge, Honorable Jean S. Breitenstein, Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan and Honorable Stephanie K. Seymour, Circuit Judges

This matter comes on for consideration of the petition of respondent for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, it is ordered:

1. The petition for rehearing is denied by Circuit Judges McWilliams, Breitenstein and Doyle, the panel to whom the case was argued and submitted.

2. The Clerk having transmitted the suggestion for rehearing en banc to the members of the panel and the judges of the Court who are in regular active service (except Judge William J. Holloway, Jr., who is recused and who did not participate) and no judge in regular active service nor judge who was a member of the panel that rendered the decision sought to be reheard having requested a vote on the suggestion, the suggestion for rehearing en banc is denied. Rule 35, Federal Rules of Appellate Procedure.

/s/ HOWARD K. PHILLIPS
Howard K. Phillips, *Clerk*

APPENDIX D

MAY TERM—AUGUST 10, 1979

Before Honorable Robert H. McWilliams, Honorable Jean S. Breitenstein, and Honorable William E. Doyle, Circuit Judges.

No. 79-1459

DAIFLON, INC., *Petitioner,*

vs.

THE HONORABLE LUTHER BOHANON, Judge of the United States District Court for the Western District of Oklahoma, *Respondent.*

The matter is before this Court on the petition of Daiflon, Inc. seeking a writ of mandamus or a writ of prohibition against the respondent trial judge, the Honorable Luther Bohanon.

On May 14, 1979, the trial court herein entered its order granting a new trial to all of the defendants in the above-entitled case. This order also set aside a very substantial jury verdict.

The matter has been extensively briefed, and the briefs include statements of the case. However, this Court is asked to judge the exercise of discretion on the part of the trial judge without having a record or a statement of evidence with which to measure the action taken by the trial court.

Accordingly, the parties are directed, in lieu of a transcript of the evidence, to prepare and sign a narrative statement of the case along the lines provided in Rule 10(d) of the Rules of Appellate Procedure. Each side shall prepare a summary of the evidence presented by it at the trial. These summaries shall be simultaneously prepared and shall be simultaneously submitted on or before September 11, 1979.

This matter shall be orally argued and presented by counsel to Division I of this Court in Denver, Colorado, on Tuesday, October 9, 1979, at 10:00 a.m.

It is the further order of the Court that proceedings in the appeal of the defendants from the judgment entered and from the order denying the motion for judgment not withstanding the verdict entered in this action on May 14, 1979, (presently Undocketed Appeal No. 24 in this Court) are suspended pending the disposition of the petition for writ of mandamus or prohibition.

/s/ Howard K. Phillips
Howard K. Phillips
Clerk

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-72-483-B

DAIFLON, INC., *Plaintiff*,

vs.

ALLIED CHEMICAL CORPORATION, et al, *Defendants*.

ORDER

Filed April 7, 1980

The court has reviewed its notes of the evidence and testimony in the above-entitled cause and the briefs of the parties, and has carefully considered the substance and tenor of the circuit court's opinion in Daiflon, Inc. v. The Honorable Luther Bohanon, No. 79-1459 (10th Cir. Dec. 21, 1979).

The trial court is charged in the aforesaid Opinion of the United States Court of Appeals for the Tenth Circuit (hereinafter Opinion) with perhaps being an advocate in favor of the defendants. The circuit court arrives at this conclusion, in part, by reading between the lines.[1] Further, the trial court is charged for oversight in failing to enter a formal order[2] and for not giving sufficient reason for vacating the jury verdict as to the matter of liability.[3] From this perspective, it seems perfectly clear to this court that considerable reason and justification for the granting of the motion can be found in the transcript appended to the circuit court's opinion. Clarification of the

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[1] Opinion at 6 and 18.

[2] Opinion at 6.

[3] Opinion at 22.

trial court's reasons, other than given, would have gladly been furnished upon request.

The trial court, in sustaining the defendants' motion for new trial, noted:

> (a) that there had not been a fair trial;[4]
>
> (b) that the court confessed error in admitting certain exhibits, to which the court after this period of reflection contends substantially affected the rights of the parties.[5] Said exhibits were not properly identified for admission under Rule 803(6), Federal Rules of Evidence.

The trial court saw and heard all the evidence (approximately four weeks of trial) and had a clear understanding of the evidence and issues before the jury; and based upon what the trial court knew, it had to, in honesty, grant defendants' motion for new trial as to all issues. The court unequivocably stated that to permit the verdict to stand and not grant a new trial, the court would be dishonest and cowardly.[6] What more can a judge say regarding his feelings that a new trial was required? The court observed that if it did not grant a new trial, it would have been exceedingly lazy.[7] What more can a judge say to show his feelings that a new trial was essential for justice to be done in this case?

This court specifically noted that it had no interest in who won or lost the case, but only in seeing that each party was afforded a fair trial, and that the ends of justice were met. This trial court has never in 19 years on the bench ever favored one party over another.

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[4] Appendix to Opinion at 4.

[5] Appendix to Opinion at 7.

[6] Appendix to Opinion at 4.

[7] Appendix to Opinion at 5.

Nor can the court candidly state that its refusal to grant defendants a judgment notwithstanding the verdict (Judgment N.O.V.) should be considered any proof of the liability of the defendants, as urged by the circuit court.[8]

This court is ordered to accept the verdict of the jury as to liability of defendants and to try the case again as to the amount of damages. The district court does not set to review and reverse the judgments of the court of appeals.[9] A district court is required to follow the mandate of a court of appeals and may not take action inconsistent with it.[10]

If this court were to retry the cause on the basis of the mandate, for the reasons hereinbefore stated, it could not be satisfied with the result. The court is passionately convinced that the issue of liability has not been proven, though there exists some evidence otherwise. Further, any verdict of damages must be founded upon a totality of the evidence—including that evidence bearing upon the question of liability.

This court is not moved to any degree by the personal charges made by plaintiff counsel in its mandamus action before the circuit court; nor is this court moved by the threats in plaintiff counsel's letter of March 26, 1980. The question of the trial court's bias and prejudice was squarely before the circuit court in the mandamus action, and the request to remove the trial court from this case was denied, or at least not acted upon, distinguishing this case from *Webbe v. McGhie Land Title Co.*, 549 F.2d (10th Cir. 1977) and the *United States v. Ritter*, 540 F.2d 459 (10th Cir. 1976). This court had desired to wait until all appellate issues had been settled before withdrawing, but

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[8] Opinion at 21.

[9] *Lacob v. United States*, 59 F.R.D. 329 (N.D. Ill. 1973).

[10] *Paull v. Archer Daniels-Midland Co.*, 313 F.2d 612 (5th Cir. 1963).

time did not permit in light of the correspondence of counsel, which is filed with the Clerk of the Court. If this court tried this case again, the provisions of 28 U.S.C.A. § 455 and § 144 would not be violated, and it is not because of these threats that this court withdraws, but rather because of the mandate.

This court respectfully withdraws from this cause and asks to be relieved from all duties in connection therewith. Said withdrawal is not based upon any feeling of prejudice or interest, accusations intimated in the circuit court's opinion and in the charges—pro and con—in the correspondence between counsel and the court. Said request of withdrawal is based wholly upon the reasons herein stated.

IT IS SO ORDERED.

Dated this 7th day of April, 1980.

/s/ LUTHER BOHANON
United States District Judge

APPENDIX F

Statutory Provisions Involved

All Writs Act, 28 U.S.C. 1651(a):

> (a) The Supreme Court and all courts established by Act of Congress may issue all write necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Section 1 of the Sherman Act, 15 U.S.C. § 1:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 2 of the Sherman Act, 15 U.S.C. § 2:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Civil No. 72-C-483-B

DAIFLON, INC., *Plaintiff*,

v.

ALLIED CHEMICAL CORPORATION, et al., *Defendants*.

MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

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The legal standards applicable to a motion for judgment n.o.v. are well settled. Although entitled to all reasonable inferences, plaintiff still has the burden of establishing a prima facie case in responding to a motion for judgment n.o.v. *Barnett* v. *Life Ins. Co. of the Southwest,* 562 F.2d 15, 17 (10th Cir. 1977). An antitrust plaintiff is not entitled to go to the jury, and cannot support a favorable verdict, "on the basis of speculation, surmise or conjecture." *Independent Iron Works, Inc.* v. *United States Corp.,* 177 F.Supp. 743, 746 (N.D. Cal. 1959), *aff'd,* 322 F.2d 656 (9th Cir.), *cert. denied,* 375 U.S. 922 (1963). As the Supreme Court pointed out in *Galloway* v. *United States,* 319 U.S. 372, 395 (1943):

> "[T]he essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked."

Furthermore, the question presented by a motion for judgment n.o.v. is not

> "whether there is no evidence supporting the party against whom the motion is made, but whether there

is evidence upon which the jury could probably find a verdict for that party."

[2] *Yazzie* v. *Sullivent*, 561 F.2d 183, 188 (10th Cir. 1977). This means that a jury verdict can be sustained only if there is substantial evidence to support it—that is, " 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Janich Bros., Inc.* v. *American Distilling Co.*, 570 F.2d 848, 853 n. 2 (9th Cir. 1977), *cert. denied*, 99 S.Ct 103 (1979), quoting from *Washington* v. *United States*, 214 F.2d 33 (9th Cir.), *cert. denied*, 348 U.S. 862 (1954).

The essential findings challenged in this motion are (1) that defendants engaged in an unlawful conspiracy to drive plaintiff out of business, (2) that defendant Du Pont monopolized, or attempted to monopolize, the non-automotive replacement market for refrigerant gas and (3) that plaintiff suffered damages in the amount of $2,500,000 as a consequence of such unlawful acts. As demonstrated below, plaintiff has failed to produce a substantial evidence showing *either* that the defendants, or any one of them, violated some provision of the antitrust laws *or* that plaintiff has suffered measurable damages as a result of acts attributable to any of the defendants. Such failure of proof requires that judgment n.o.v. be entered for defendants.

I. The Background Facts

Plaintiff, Daiflon, Inc., was formed for the purpose of importing refrigerant gas from Japan, repackaging this gas in smaller cylinders, and selling it in the United States. Carter, Tr. 147. Daiflon commenced operations in early 1969, imported refrigerant gas until August 1971, and made its last sale in October 1972. Carter, Tr. 99, 104.

Daiflon's Japanese supplier was unable to provide it with adequate amounts of gas in 1969 and 1970; neverthe-

less, at no time during its existence did Daiflon ask any of the defendants—the domestic manufacturers of refrigerant [3] gas—to sell it any grade of gas. Carter, Tr. 148, 343. Mr. Richard Carter, plaintiff's president, testified that by early 1971 Daiflon's supply problems had been solved, and that Daiflon then had a viable business. Carter, Tr. 103. The value of the business at that time, as reflected in a contemporaneous stock sale as well as in statements and analyses that were *not* prepared for purposes of this litigation, was $200,000. Carter, Tr. 254; McDonald, Tr. 523, 554, 572-576; Def. Exh. Nos. 7, 8.

In August 1971, the President of the United States imposed a 10 percent surcharge of all imports from Japan and other countries. Carter, Tr. 176-177; Def. Exh. No. 6. The effect of the surcharge of Daiflon's importing business was "disastrous." Carter, Tr. 213. Daiflon did not place any orders for refrigerant gas with its Japanese supplier after that time. Carter, Tr. 214-215. This surcharge remained in effect until December 1971, when it was replaced by new exchange rates involving the dollar, the Japanese yen and other currencies. As of December 15, 1971, the devaluation of the dollar as against the Japanese yen had the effect of increasing by some 17 percent the cost of imported Japanese goods, including refrigerant gas. Bradfield, Tr. 28.

Mr. Carter and Mr. R. D. McDonald, the primary investor in Daiflon, testified that, even before these cost increases, Daiflon's costs were higher than those of the domestic manufacturers. Carter, Tr. 154-155; McDonald, Tr. 586-587. During the four years of its existence, Daiflon sold a total of some 2.4 million pounds of refrigerant gas, which was less than ¼ of one percent of the total sales of refrigerant gas in the United States during that period. Hibdon Direct, Tr. 34; Def. Exh. No. 91. At no time did Daiflon realize a profit on its refrigerant gas business. Carter, Tr. 275-285.

[4] The defendants are the six domestic manufacturers of refrigerant gas. Du Pont was the first entrant into this business. Until 1949 patents covering refrigerant gas products legally precluded the sale of refrigerant gas in the United States by any other person. After the original patents expired, the other defendants entered this business. Allied Chemical was the first new entrant, in 1952; Racon was the last of the defendants to commence the manufacture and sale of refrigerant gas, doing so in 1965. In 1977, Union Carbide ceased manufacturing refrigerant gas. Hibdon Direct, Tr. 11-12; Pl. Exh. No. 1113, pp. 15-16.

It is undisputed that refrigerant gas is a homogeneous, fungible product—that is, the gas produced by any defendant is chemically identical to the gas produced by any other defendant. Rose, Deposition 47; Hibdon Direct, Tr. 10, 23-24. The economic implication of this fact is also undisputed. The economists who appeared were unanimous in stating that, because of the homogeneous nature of refrigerant gas, one would expect substantial similarity in refrigerant gas prices among the defendants. The reason is that no purchaser would pay any defendant more for its refrigerant gas than it had to pay to obtain the refrigerant gas of any other defendant. Hibdon Direct, Tr. 10-11, 24; Gup., Tr. 1075-1077; Jadlow, Tr. 1169, 1172-1173.

This did not mean, however, that there was no price competition among the defendants. On the contrary, while the list prices of each defendant were similar, there was substantial discounting off list prices. Hibdon Direct, Tr. 28-29. In addition, there were other competitive activities that affected the prices paid by various of the defendants' customers. This price competition was intense throughout the 1969-1972 period, throughout the United States. Hibdon Direct, Tr. 9, 20, 28-29, 36-38.

[5] Plaintiff's claim is that it was forced to begin liquidating its business operations in August 1971 because of a 13 percent reduction in the defendants' list prices in the

spring of 1971. Carter, Tr. 110-112; McDonald, Tr. 538, 597. It claims that this general reduction in list prices was the result of a conspiracy among the defendants to drive it out of business. It also claims that Du Pont's pricing practices independently violated Section 2 of the Sherman Act.

We begin by showing that plaintiff tendered no evidence to support the latter claim. We then show that there was also a complete failure of proof on the conspiracy issue. Finally, we show the lack of any probative evidence to support any award of damages to Daiflon, much less the jury's determination that plaintiff's damages were $2,500,000 before trebling.

II. Plaintiff Failed To Produce Substantial Evidence of Monopolization or Attempted Monopolization by Du Pont

The essential elements of a monopolization charge are "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Pacific Engineering & Production Co.* v. *Kerr-McGee Corp.*, 551 F.2d 790, 791 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977), citing *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966). A case of attempted monopolization, by contrast, requires "proof [1] that the defendant's conduct was motivated by specific intent to monopolize and [2] that a dangerous probability of monopoly power existed." *Ibid.*, citing *E. J. Delaney Corp.* v. *Bonne Bell, Inc.*, 525 F.2d 296 (10th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976). Plaintiff's proof with respect to each of [6] these elements fell far short of the required showing. Indeed, the evidence at trial absolutely precluded a finding of monopolization or attempted monopolization by Du Pont.

A. *The Relevant Market Is National in Scope*

Plaintiff's expert economist, Dr. Joseph Jadlow, testified that, in his opinion, the relevant market "would probably be the non-automotive aftermarket for refrigerant gas." Jadlow, Tr. 1158. This is the market in which Daiflon sold refrigerant grades 11, 12 and 22. Carter, Tr. 321. Du Pont did not dispute that conclusion—and the Court's instructions, as well as the special verdict form that was submitted to the jury, reflected the parties' agreement that the relevant product market consists of refrigerant gas used in the non-automotive replacement market.

The only evidence on the question of the geographic scope of the relevant market established that it was a national market. Dr. Jadlow so testified (Tr. 181):

> "Q. Now, I believe you defined the relevant market, as you view it, as the non-automotive replacement market for refrigerant gas.
>
> "A. Yes. * * *
>
> "Q. That would be a product market throughout the United States?
>
> "A. Yes."

Dr. Jadlow's testimony on this issue was consistent with the testimony of company witnesses whose depositions were read by plaintiff. Mr. Robert Wright, Marketing Manager for Refrigerants at Du Pont, testified that Du Pont refrigerants are distributed to the non-automotive replacement market on a national basis and that Du Pont's list prices apply throughout the United States. *E.g.*, Wright, Deposition 194-198. Representatives of Allied Chemical, Union Carbide and Kaiser also testified that the refrigerant distribution policies of their respective companies encompassed the entire United States—and with the [7] exception of instances involving isolated competitive offers to individual customers, that their company

pricing policies reflected national, rather than regional, marketing conditions.[1]

The evidence at trial thus showed a national market for refrigerant gas used for non-automotive replacement purposes. As in *United States* v. *Grinnell Corp., supra,* 384 U.S. at 576, the evidence in this case was of a business "operated on a national level," with "national planning"; each of the defendants had "a national schedule of prices * * * and terms," which occasionally were "varied to meet local [competitive] conditions"; indeed, in light of the evidence at trial, only a national market "reflects the reality of the way in which [the defendants, including Du Pont] built and conducted their [replacement refrigerant] business." *See also, e.g., Tampa Elec. Co.* v. *Nashville Coal Co.,* 365 U.S. 320, 327 (1961); *Standard Oil Co.* v. *United States,* 337 U.S. 293, 299 n. 5 (1949); *United States* v. *Empire Gas Corp.,* 537 F.2d 296, 304 (8th Cir. 1976), *cert. denied,* 429 U.S. 1122 (1977); *Castlegate, Inc.* v. *National Tea Co.,* 34 F.R.D. 221, 223 (D. Colo. 1963).

There was no competent evidence at trial of a market having a more limited geographic scope. Although Mr. Carter and Mr. Bus Adams testified that plaintiff sold its replacement refrigerant products in approximately 31 states at various times during the 1969-1972 period (Carter, Tr. 603; Adams, Tr. 647-648), that testimony was totally insufficient to establish that the relevant market was limited to those states.

In assessing claims that a particular market is limited to a specific region or locality, the courts have **[8]** focused on two factors: (1) the extent to which the defendants are unable, as a practical matter, to sell the relevant product outside the region or locality because of high transportation costs and (2) the extent to which buyers are unable to

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[1] *E.g.*, Regan, Deposition 19-24; Napoli, Deposition 7, 131, 152; Sorensen, Deposition 20-23.

go to sellers located outside the region or locality to obtain the product. *E.g., United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 357 (1963); *Tampa Elec. Co.* v. *Nashville Coal Co., supra*, 365 U.S. at 327; *Honeywell Inc.* v. *Sperry Rand Corp.*, 1974-1 Trade Cas. ¶ 74,874 (D. Minn. 1973); *Case-Swayne Co.* v. *Sunkist Growers, Inc.*, 369 F.2d 449, 456 (9th Cir. 1966), *cert. denied*, 387 U.S. 932 (1967). There was no evidence in the present case that transportation costs prevented any of the major sellers of refrigerant gas from selling that product in other than the states in which plaintiff actually made sales. Neither was there evidence showing that individual purchasers were unable to obtain refrigerant gas from other than regional or local sources. The evidence was, in fact, to the contrary —that is, there was ample testimony showing that most wholesalers of refrigerant gas purchased from one or more of the defendants, each of which operated on a national scale. *See, e.g.*, Lynn, Deposition 19-21; Dailey, Deposition 19.

In short, if plaintiff intended at trial to carve out a regional market for the purpose of its monopolization and attempted monopolization claims against Du Pont, it failed to accomplish that objective.[2]

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[2] During discussions with the Court in connection with the framing of instructions, Mr. Gregory, one of plaintiff's counsel, appeared to suggest that the jury could infer from the fact that plaintiff actually had sold refrigerant in 31 states that the relevant market is limited to those states. That suggestion is, of course, untenable. If the suggestion were accepted, an antitrust plaintiff could concentrate its sales efforts in those local areas in which a high percentage of the sales were being made by a particular company—and, by means of such manipulation, make the target company vulnerable to a monopolization charge. The test for the geographic component of the relevant market focuses on market realities; for good reason, the efforts of an individual plaintiff to limit its claim to areas having no separate economic significance are entitled to no weight. *See, e.g.*, Telex Corp. v. International

[9]

B. *Plaintiff Failed To Show That Du Pont Possessed Monopoly Power in the Relevant Market*

Monopoly power is defined generally as the "power to control prices or to exclude competitors" in a relevant market. *E. g., Telex Corp.* v. *International Business Machines Corp., supra,* 510 F.2d at 914. Whether a particular antitrust defendant possesses monopoly power often involves a complicated factual inquiry, requiring an assessment of the strength and vigor of the defendant's competitors as well as the existence of barriers to entry that might prevent new firms from entering the market. No such inquiry is required here, however, because the size of Du Pont's market share during the period of plaintiff's existence absolutely precludes, as a matter of law, a valid finding of monopoly power.

1. Du Pont's Market Share Is Such As To Preclude a Valid Finding of Monopoly Power

The courts have held on numerous occasions that "control of less than 50 percent of the relevant market is by itself sufficient evidence that monopoly power does not exist." J. von Kalinowski, *Antitrust Laws and Trade Regulation* § 8.02[2], pp. 8-34 and 8-34.1 (1979 ed.). In fact, in those instances in which the Supreme Court has sustained findings of monopoly power, the market shares involved have [10] ranged from a minimum of 70 percent (*United States* v. *Paramount Pictures, Inc.,* 334 U.S. 131

Business Machines Corp., 510 F.2d 894, 917 (10th Cir. 1975), *cert. dismissed,* 423 U.S. 802 (1976).

Of course, if this Court should conclude that the relevant market is limited to the 31 states in which plaintiff sold refrigerant gas at some time during the period of its existence, that conclusion would not benefit plaintiff since there was no evidence, of any sort, of Du Pont's market share in those states. See discussion at pp. 12-15 *infra.*

(1948)) to a high of 90 percent (*Standard Oil Co.* v. *United States*, 221 U.S. 1 (1911)). As the Supreme Court explained in *United States* v. *United States Steel Corp.*, 251 U.S. 417, 444 (1920), in discussing the significance of a substantially larger market share than plaintiff established here:

> "The power attained was much greater than that possessed by any one competitor—it was not greater than that possessed by all of them. Monopoly, therefore, was not achieved. * * *"

Accord, e.g., Holleb & Co. v. *Produce Terminal Cold Storage Co.*, 532 F.2d 29, 33 (7th Cir. 1976) (monopolization claim rejected since, even assuming the appropriateness of the market plaintiff had alleged, plaintiff failed to prove that defendant "had a dominant share exceeding 60% of the market"); *Twin City Sportservice, Inc.* v. *Charles O. Finley & Co.*, 512 F.2d 1264, 1274 (9th Cir. 1975) (50 percent market share insufficient to establish monopoly power); *Telex Corp.* v. *International Business Machines Corp., supra*, 510 F.2d at 915-16, 919 (36.7 percent of the relevant market "is insufficient to justify any inference or conclusion of market power", and further quoting with approval, "something more than 50% of the market is a prerequisite to a finding of monopoly"); *White Bag Co.* v. *International Paper Co.*, 1974-2 Trade Cas. ¶ 75,188 (4th Cir. 1974) (tabulation of cases revealed monopoly power is found only when share of relevant market is 70 percent or more); *Continental Baking Co.* v. *Old Homestead Bread Co.*, 476 F.2d 97, 104 (10th Cir.), *cert. denied*, 414 U.S. 975 (1973) ("[I]t is fairly clear that a market share of fifty-one percent would not constitute monopoly power."); *Cliff Food Stores, Inc.* v. *Kroger, Inc.*, 417 F.2d 203, 207 n. 2 (5th Cir. 1969) ("It appears that something more than 50% of the market is a prerequisite **[11]** to a finding of monopoly."); *United States* v. *Aluminum Company of America*, 148 F.2d 416, 424 (2nd Cir. 1945) (Over 90 per-

cent of the relevant market "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not."); *Nankin Hosp.* v. *Michigan Hosp. Service*, 361 F. Supp. 1199, 1209 (E.D. Mich. 1973) (market share below 50 percent insufficient to show monopoly power).

The evidence at trial showed that Du Pont's share of the non-automotive refrigerant gas replacement market during the 1969-1972 period was approximately 40 percent. That is well below the 50 percent figure that, in the Tenth Circuit as elsewhere, has been held "by itself" to be "sufficient evidence that monopoly power does not exist." Von Kalinowski, *Antitrust Laws and Trade Regulation, supra.* The most reliable evidence of Du Pont's market share during the relevant period is probably the Du Pont Business Plan, which was prepared for internal use by Du Pont in November 1971. Du Pont's share of the non-automotive refrigerant gas replacement market is estimated in the Business Plan to have been 39 percent as of 1971. Pl. Exh. No. 1113, p. 13. This is consistent with the estimate of Du Pont's market share contained in the Marketing Plans of Pennwalt for the years 1971 and 1972; according to the Pennwalt Marketing Plans, Du Pont's share of the replacement market in 1971 was approximately 40 percent and in 1972 was approximately 38 percent. Pl. Exh. No. 4146, p. 5; Pl. Exh. No. 4196, p. 4.[3]

Although there was no evidence that Du Pont's share of the refrigerant gas replacement market approached 50 percent during the 1969-1972 period, one of the jury's **[12]** findings, as reflected by the special verdict form, purported to find to the contrary. Verdict Form, Finding No. 3. This finding cannot be sustained in view of the total

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[3] It also is consistent with the estimate of Du Pont's market share provided by officials of Allied Chemical, Kaiser, Union Carbide and Racon. Regan, Deposition 96; Sorenson, Deposition 158; Napoli, Deposition 125; Knopf, Deposition 96.

absence of record evidence to support it. Indeed, the finding could only have been based on the mischaracterization of market share evidence by plaintiff's counsel during closing arguments.

At two points during his closing argument, plaintiff's counsel stated that there was evidence that would support a finding that Du Pont's share of the refrigerant gas replacement market exceeded 50 percent. Near the outset of his argument, plaintiff's counsel referred to a Union Carbide document that, according to counsel, "shows that Du Pont's share of the 22 market was 53 percent * * *." Crawford, Tr. 1494. But plaintiff made no effort to establish by evidence at trial that the relevant product market was limited to grade 22 refrigerant gas; there was no evidence at all tending to show that it would be appropriate to treat any single type of refrigerant gas as a relevant market, and plaintiff's counsel never even argued that issue to the jury. Moreover, the Union Carbide document relied upon by plaintiff's counsel was not limited to the non-automotive replacement market. Rather, it dealt with market share for all end uses in the aggregate—which means that it included fluorocarbons sold as aerosol propellants, foaming agents, solvents and resins, in addition to refrigerant gas sold to original equipment manufacturers and for replacement purposes. Pl. Exh. No. 4500, p. 5. Accordingly, the 53 percent market share figure referred to by counsel cannot support any finding that in the non-automotive replacement market Du Pont had a greater than 50 percent share of any or all refrigerant gas sales.

Plaintiff's counsel also relied during closing arguments on the testimony of Mr. Bus Adams for the proposition that Du Pont's share of the relevant market during the [13] 1969-72 period exceeded 50 percent. According to counsel:

> "Now, one thing about Mr. Adams[']s testimony that I wanted to testify to, or I want to advise you of and

request that you consider, is that Mr. Adams stated that he traveled throughout these whole 31 states and Puerto Rico, and you know that he did, * * * but he also testified that he understood the territory, he understood the competition, and his estimate was that Du Pont had over 50 percent of the refrigerant gas aftermarket in that market area, in that relevant market, and there has been no testimony in this matter to refute that, and it stands unrefuted, and it's the truth." Crawford, Tr. 1507.

The testimony by Mr. Adams referred to was not accurately described by counsel, and, in any event, the testimony is both irrelevant and demonstrably unreliable. As already noted, there is no basis for concluding that the relevant geographic market for the purpose of this case is anything but national in scope. But, in addition, the cross-examination of Mr. Adams demonstrated beyond peradventure that Mr. Adams' statements concerning Du Pont's market share amounted to no evidence at all, much less substantial evidence. During cross-examination, Mr. Adams testified as follows:

"Q. Now, you testified yesterday as to the apparent comparative volume of refrigerant gas of Du Pont as compared to the sales volume of the other defendants.

Was that testimony based on any survey that you conducted?

"A. No, sir, it came from individuals that I knew from the past years.

"Q. Was this an individual at Pennwalt that told you that?

"A. No, sir.

"Q. Individual at Du Pont?

"A. No, sir.

"Q. Individual in any one of these companies?

"A. It was an individual of some of your largest distributors.

[14] "Q. * * * So it's information that came to you from some customers; is that right?

"A. Yes, sir.

"Q. All customers or just some?

"A. Oh, I would say I could name you about three or four.

"Q. Is that the basis for your testimony?

"A. Well, observing is very good.

* * *

"Q. I asked whether you went into the backroom of wholesalers or contractors' offices and counted up the number of Pennwalt cylinders, the number of Carbide cylinders, and that's how you decided. Did you do that?

"A. No. I did not go back and count them, no, sir.

"Q. Did you ask people that you called on where they bought their refrigerants from?

"A. I may or I may have not.

"Q. You don't remember?

"A. No, sir."

Adams, Tr. 772-774.

Following this exchange, plaintiff's counsel asked Mr. Adams on redirect to estimate Du Pont's market share in the area in which Daiflon was operating. Mr. Adams responded as follows:

> "I would say du Pont's sales [were] over 50 percent of the customers that I called on, and I talked to presidents of the companies that told me what purchases they bought." Adams, Tr. 775.

It is thus apparent that plaintiff's counsel mischaracterized Mr. Adams' testimony in suggesting that Mr. Adams had stated that Du Pont "had over 50 percent of the refrigerant gas after-market" in the 31 states in which plaintiff actually made refrigerant gas sales during the 1969-1972 period. In fact, Mr. Adams' testimony was that Du **[15]** Pont's sales were "over 50 percent of the customers that [he] called on" (Adams, Tr. 775)—a group that hardly amounts to a relevant market. Moreover, it is difficult to conceive of less reliable evidence of Du Pont's sales to even these isolated, and unnamed, customers than is provided by Mr. Adams' testimony.

Mr. Adams conceded on cross-examination that his market share estimate was not based on any survey he had undertaken or on conversations he had had with representatives of any of the defendants. Although he appeared at one point to testify that his estimate was based on conversations with three or four Du Pont customers concerning their own purchases, he stated subsequently that he did not remember whether he had asked people on whom he called for information as to the sources of their refrigerant purchases. It is, of course, impossible to reconcile this statement with Mr. Adams' statement on redirect examination that he had "talked with presidents of the companies that told me what purchases they bought." Adams, Tr. 775. Finally, although Mr. Adams suggested that his estimate of Du Pont's market share might be based on "observing" (Tr. 773), he later testified that he did not go into the backroom of wholesalers or contractors and count the number of cylinders in stock from the various manufacturers.

In short, although the mischaracterization by plaintiff's counsel of Mr. Adams' testimony may explain the jury's finding that Du Pont's share of the non-automotive refrigerant gas replacement market exceeded 50 percent during the 1969-1972 period, the testimony itself is a wholly inade-

quate predicate for an antitrust verdict. The only credible evidence in the present record of Du Pont's share of the relevant market places it at approximately 40 percent. As a matter of law, a market share of 40 percent is insufficient to permit a finding a monopoly power.

[16] 2. Du Pont Lacked Power To Control Prices Or Exclude Competitors

Of course, even if one assumes, contrary to the evidence, that Du Pont's share of the relevant market during the 1969-1972 period was greater than 50 percent, that would not necessarily mean that Du Pont possessed monopoly power. Once a company's market share has been shown to exceed 50 percent, the law requires that an assessment be made to determine whether, in view of other industry characteristics, the company has the power "to control prices or to exclude competition." *Telex Corp.* v. *International Business Machines Corp., supra,* 510 F.2d at 914. Even if Du Pont's minority market share is ignored, the evidence at trial showed conclusively that Du Pont did not possess any such power.

A company cannot be said to have monopoly power over price unless it has the power to charge prices for its products substantially without regard to competitive conditions and without having to take into consideration the prices of its competitors' products. *E. g., Continental Baking Co.* v. *Old Homestead Bread Co., supra,* 476 F.2d at 104; *Cole* v. *Hughes Tool Co.,* 215 F.2d 924, 938 (10th Cir. 1954). To put the matter another way, a company does not have monopoly power over price unless it has substantially unbridled discretion to charge a premium for its products —and thereby, at its option, to reap monopoly profits. *E.g., Janich Bros., Inc.* v. *American Distilling Co., supra,* 570 F.2d at 856; *Pacific Engineering & Production Co.* v. *Kerr-McGee Corp., supra,* 551 F.2d at 797. If, on the other hand, there is—as Dr. Jadlow, plaintiff's economic expert,

testified—"price competition, true price competition, * * * that is not a monopoly market." Jadlow, Tr. 1186.

[17] The present record is devoid of any evidence tending to show that Du Pont had sufficient market power to be able to charge prices for its refrigerant products in the non-automative replacement market without regard to the prices charged by its competitors. In fact, the evidence showed overwhelmingly that any effort by Du Pont to charge a higher price than any of its competitors would have resulted in lost sales and market share by Du Pont—hardly the kind of penalty a monopolist would suffer. Thus, one of the options discussed in the Du Pont Business Plan for 1971 was to "[i]ncrease prices and/or resist lower prices offered to key accounts by competition." This option was rejected by Du Pont because, as stated in the Business Plan, "[a]ttempts to increase prices or resist lower competitive price offerings at this time would lead to a loss in market position and have a detrimental effect on long-term earnings." Pl. Exh. No. 1113, p. 21.

This assessment of Du Pont's lack of significant market power was echoed by numerous witnesses at trial. Mr. Robert Wright of Du Pont testified, for example, that one of the primary reasons Du Pont lowered its list prices for replacement refrigerants in March 1971 was that "it was quite evident that we were not competitive at a number of wholesalers, and as such [Du Pont] was being penalized in penetration * * *." Wright, Deposition 187. So far as the March 1972 price decrease, initiated by Allied Chemical, was concerned, Mr. Wright observed that "we would have been very pleased to have been able to get the price up, and at least gain some of our profit back. Competitive conditions certainly precluded this, in our best judgment." *Id.* at 114; [18] *see also* O'Donnell, Deposition 36-41; Hibdon Direct, Tr. 10-11, 24.[4]

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[4] Plaintiff's counsel argued at length in his closing arguments that Du Pont was a "price leader" in the refrigerant gas in-

An alternative way of looking at a company's market power, suggested by plaintiff's expert economist, Dr. Jadlow, is to assess the extent to which the company is subject to "price competition, true price competition." Jadlow, Tr. 1186. The existence of vigorous price competition is, of course, inconsistent with the possession of monopoly power over price. If a company must adjust its prices downward in response to lower-price competitive offerings in order to avoid a loss of sales, that company lacks the kind of control over prices that is encompassed by the phrase "monopoly power." *E.g., Telex Corp.* v. *International Business Machines Corp., supra,* 510 F.2d at 914.

There was overwhelming evidence at trial of vigorous price competition in the sale of replacement refrigerants, and undisputed evidence of Du Pont's vulnerability to that competition. In addition to acknowledging Du Pont's inability to "increase prices and/or resist lower prices offered to key accounts by competition" without a significant loss of sales and market share, the Du Pont Business Plan clearly spells out Du Pont's intentions as of November 1971 to compete actively with the other sellers of refrigerant gas on the basis of price, service to customers and technical innovation. Pl. Exh. No. 1113, pp. 19-21. The [19] Business Plan also summarizes the kind of competi-

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dustry. *E.g.*, Crawford, Tr. 1364. In fact, however, of the five major list price changes that occurred during the 1969-1972 period, Du Pont was the first company to implement only one—in March 1971. Wright, Deposition 91, 98, 113-116; O'Donnell, Deposition 44-45; Napoli, Deposition 148. In addition, both Mr. Wright and Mr. O'Donnell testified that it was Du Pont's policy not to offer to sell to individual customers at prices below list unless Du Pont was meeting a competitive offer. Wright, Deposition 52-53; O'Donnell, Deposition 29-30. Finally, the evidence was undisputed that Du Pont could not charge a higher price for its refrigerant gas than its competitors without losing sales and, consequently, market share. Pl. Exh. No. 1113, p. 21; Hibdon Direct, Tr. 24.

tion Du Pont faced in the replacement market for refrigerant gas from the other American manufacturers:

> "Allied * * * emphasizes special price deals coupled with intensive personalized entertainment. Union Carbide * * * and Pennwalt * * * focus on special price deals motivated by their need to fill expanded capacity. Racon also uses price deals in an attempt to move their mix to a high cylinder/bulk ratio. Kaiser uses incentive trips to gain business." *Id.* at 13.

If Du Pont had possessed monopoly power, as alleged by plaintiff, it would not have been concerned about price competition from other companies—and there would have been no reason for Du Pont to resolve to compete on the basis of price, service to customers or technical innovation.

The Du Pont Business Plan is not alone in providing a sense of the competition Du Pont faced during the 1969-1972 period. The Du Pont Monthly Report for December 1970 observed, for example, that "[t]he decline in sales to wholesalers [during 1970] was due to competitive deals which we were reluctant to meet until mid-year. These included extended terms, rebates, discounts, and LTL's at the truckload price." Pl. Exh. No. 1296, p. 2. The Monthly Report for January 1971 commented: "There is continuing deterioration of prices in the marketplace due to increased competitive rebates." Pl. Exh. No. 1297, p. 3. The Report for July 1971 contained a similar observation: "Price erosion continues in the wholesale market." Pl. Exh. No. 1303, p. 1. Finally, the Monthly Report for November 1971 indicated that the vigorous competitive activity, centering on price, that had been described in the earlier reports had not abated: "Competition is fierce. They have upgraded their personnel and they are continuing to offer selected and special deals." Pl. Exh. No. 1090, p. 2.

[20] Additional insight into the extent of competitive activity, and of Du Pont's lack of control over the market

price of refrigerants, during the period of plaintiff's existence also is provided by the competitive price authorization forms ("CPA's") that plaintiff chose to offer into evidence. The mere existence of those CPA's, which record price deals reported by wholesalers to have been offered by Du Pont's competitors and decisions by Du Pont to meet these offers to avoid losing business, is inconsistent with the notion that Du Pont possessed monopoly power over price. Moreover, even a cursory examination of the CPA's that are in evidence confirms that Du Pont faced intensive price competition from all of the other American manufacturers of refrigerants—and that Du Pont was well aware that it would lose sales in the event it refused to lower its prices to meet competitive offers. *E.g.*, Pl. Exh. Nos. 1117, 1119, 1120 and 1121 (price competition at Baker Brothers from Allied, Pennwalt and Union Carbide); Pl. Exh. No. 1154 (price competition at Harry Alter Company from Kaiser, Allied, Union Carbide and Pennwalt); Pl. No. 1163 (price competition at Refrigeration Supplies from Racon, Allied, Pennwalt and Kaiser); Pl. Exh. No. 1164 (price competition at Solar Supply from Union Carbide, Pennwalt and Allied); Pl. Exh. 1166 (price competition at Standard Brass from Union Carbide and Kaiser); Pl. Exh. Nos. 1179, 1180 and 1181 (price competition at Tersco from Allied and Union Carbide); Pl. Exh. Nos. 1182-1185, 1189, 1192 and 1194 (price competition at Waugh Brothers from Pennwalt, Racon, Allied and Union Carbide).

It defies reason to maintain, in the face of all this evidence, that Du Pont possessed monopoly power over the market price of replacement refrigerants—that it had **[21]** the power to price and sell refrigerant gas in the replacement market without regard to the activities of its competitors. The simple fact, which was clearly and undisputably evidenced at trial, is that Du Pont did not have monopoly power over the price of refrigerant gas.

It is equally clear that Du Pont lacked the power to exclude competitors or prospective competitors from the

non-automotive replacement market for refrigerant gas. Once the original refrigerant gas patents expired in 1949, any barriers to entry that remained did not prevent the other defendants in this case from beginning to produce and sell refrigerant gas. There was no evidence at trial that Du Pont attempted to prevent any of the defendants from entering the refrigerant gas business—or, even more importantly, any evidence that it would have had the power to do so had it made the effort. The fact that Allied Chemical, Union Carbide, Pennwalt, Kaiser and Racon were able successfully to enter the refrigerant gas business prior to the time plaintiff began to import refrigerant gas from Japan shows conclusively that entry was possible so long as the potential entrant was not subject to disabling operating problems and diseconomies. Indeed, the presence of these competitors—all of which, with the exception of Racon (which was only in fluorocarbons), were large multi-product companies (Hibdon Direct, Tr. 12)—is fatal to any claim that Du Pont had the power to exclude competitors from the non-automotive replacement market for refrigerant gas.

C. *There Is No Evidence of the Exercise by Du Pont of Monopoly Power*

A further defect in plaintiff's individual monopolization claim against Du Pont stems from the fact that the possession of monopoly power, of itself, does not violate [22] the antitrust laws. Before a monopolization claim can be sustained, there must be a showing that monopoly power was employed unfairly. *E.g., Pacific Engineering & Production Co.* v. *Kerr-McGee Corp., supra,* 551 F.2d at 791; *Telex Corp.* v. *International Business Machines Corp., supra,* 510 F.2d at 926-27. As in the *Pacific Engineering* case, the "essential unfair means" alleged here relates to what plaintiff has characterized as "predatory pricing."

According to plaintiff's president, Mr. Richard Carter, the lowering of list prices in March 1971 effectively "stopped" plaintiff's sales of refrigerant gas. Carter, Tr. 196. Mr. Carter also testified that it was not until June 1971 that the full force of that price decrease was felt in the marketplace—and that plaintiff did not order any refrigerant gas from Japan after that time because plaintiff was unable, because of the price decrease, to sell the refrigerant gas plaintiff already had in storage. Carter, Tr. 197-198. Although plaintiff apparently continued to sell small quantities of refrigerant gas until October 1972, Mr. R. D. McDonald testified that in August 1971 The United States National Bank in Galveston, which had loaned substantial operating capital to plaintiff, instructed plaintiff to begin an "orderly liquidation" of its operations. McDonald, Tr. 538, 597. As plaintiff's counsel explained the situation in his closing argument:

> "For six months they just went like a house afire. From January of '71 to June of '71, they did great. They did great.
>
> * * *
>
> "And then in June of '71, the handle was turned off, and it stopped. Didn't have any more customers.
>
> * * *
>
> "They were out, and they realized they were out, and the bank advised them to go through whatever they called it, an orderly liquidation or something of that nature.

[23] "They were through. They had been driven out." Crawford, Tr. 1386, 1388.

The question that must be considered, then, is whether—assuming *arguendo* that Du Pont had monopoly power—Du Pont's decision in March 1971 to reduce its list prices for refrigerant gas in the non-automotive replacement mar-

ket constituted an "unfair means" of competition. The evidence at trial permits but one answer: that is, that the March 1971 list price reduction represented entirely reasonable, and permissible, competitive behavior by Du Pont.

There was extensive testimony concerning the nature of and the reasons for the March 1971 price reduction. Although Du Pont announced to the trade that it was reducing its list prices by 13 percent, the reduction amounted in fact to only eight percent. The reason is that, in implementing the reduction, Du Pont eliminated the five percent prompt payment discount that it previously had been allowing. Wright, Deposition 98, 194-198; O'Donnell, Deposition 44-45. Moreover, at least 50 percent of Du Pont's customers already were purchasing at the reduced price because of price competition Du Pont had encountered at those accounts from the other defendants. Wright, Deposition 197; O'Donnell, Deposition 45. The Du Pont executives responsible for the price reduction understood that customers who already were purchasing at the reduced prices would react unfavorably to extension of the lower terms to other customers (*e.g.*, Pl. Exh. No. 1042), but they concluded that a lowering of Du Pont's list prices was nevertheless required by competitive conditions.

As explained by Mr. Wright and Mr. O'Donnell, the March 1971 price reduction represented an effort on Du Pont's part to stop the loss of sales and erosion of market position that had been occurring. As stated by Mr. Wright, Du Pont's Marketing Manager for Refrigerants:

[24] "[W]hen I joined the [Freon Products] group in the fall of '70, it was quite evident that we were not competitive at a number of wholesalers, and as such were being penalized in penetration; a as long as that volume was not great in penalty, and the prices maintained themselves, we still were making good money, but as soon as the volume began to eat away to the point that our plants were running at such a

rate that all of the distributives that I mentioned were beginning to be constant on a smaller group of pounds, then the profits began to tumble." Wright, Deposition 188.

Mr. Wright and Mr. O'Donnell also testified that although they were aware of Daiflon's existence as of March 1971, that fact did not play any role in the decision to reduce Du Pont's list prices. Wright, Deposition 198-199; O'Donnell, Deposition 92. That is hardly surprising since not one of the CPA's that were received in evidence mentioned Daiflon as the source of a competitive offer to one of Du Pont's customers; and, as noted previously, Daiflon sold only 2.4 million pounds of refrigerant gas during the four years of its existence, which was less than ¼ of one percent of the total sales of refrigerant gas in the United States during that period. Discussion at p. 3 *supra*. The competition that led Du Pont to reduce its list prices in March 1971 was from the other defendants, not from Daiflon.

Furthermore, there is no evidence whatsoever, that as a result of the March 1971 price reduction, Du Pont was selling its refrigerant gas below either its fully allocated cost or its marginal or incremental costs. Neither is there any basis for finding that Du Pont was making other than a reasonable profit on the sales it made pursuant to the March 1971 list price reduction; indeed, the undisputed evidence was that Du Pont would have sacrificed short-term profits had it not reduced its list prices at that time. In sum, in light of the competitive conditions that existed as of March 1971, the decision by Du Pont to reduce its list prices constituted "rational, competitive behavior." *Pacific* [25] *Engineering & Production Co.* v. *Kerr-McGee Corp., supra,* 551 F.2d at 797.[5]

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[5] The testimony of Mr. Wright indicating that Du Pont made some below-cost sales of refrigerant gas in mid-1972 is of no assistance to plaintiff. Although plaintiff's counsel failed to mention the fact in his arguments to the jury, Mr. Wright testified that,

The fact that the lowering of Du Pont's list prices may have made life more difficult for Daiflon does not make Du Pont's actions unlawful.[6] As the court of **[26]** appeals

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although below fully-allocated cost, each of those sales was above Du Pont's marginal and average variable costs. Wright, Deposition 193-194. Mr. Wright testified additionally that the sales below fully-allocated cost were made to meet competition from the other defendants, not Daiflon, following the list price reduction first made by Allied Chemical in March 1972. *Id.* at 114. Finally, any such sales are, in any event, irrelevant to this case since, as already noted, plaintiff's position at trial was that it was driven out of business by the events of mid-1971, and that the "orderly liquidation" of plaintiff's operations that was ordered at that time by The United States National Bank in Galveston was virtually complete by mid-1972. *E.g.*, Crawford, Tr. 1386, 1388.

[6] This would be true even if there were evidence, which there is not, that this was Du Pont's intent. Under the law in this Circuit, as elsewhere, sales made by a company above its fully-allocated costs (at the very least) are conclusively presumed to be lawful. *E.g.*, Pacific Engineering & Production Co. v. Kerr-McGee Corp., *supra*, 551 F.2d at 795-97.

Thus, the statements of plaintiff's counsel during closing arguments focusing on Pl. Exh. No. 1066, a trade report written by a Du Pont salesman in Birmingham, Alabama, were wholly beside the point. The portion of that exhibit relied upon by counsel reads as follows: "Mr. Gennett is causing quite a stir in the Birmingham area. He is passing on the 13% discount that we offered in order to combat the Japanese refrigerant." Since there was no evidence that any sales made by Du Pont pursuant to the March 1971 list price reduction were below Du Pont's fully-allocated costs, such sales would not have been unlawful (or have had any relevance to plaintiff's monopolization or attempted monopolization charges), even if made "to combat the Japanese refrigerant." Moreover, there is no evidence that the writer of the trade report, a salesman in the field, had any knowledge concerning Du Pont's intent in reducing its list prices in March 1971. Finally, we submit that the quoted portion of the trade report cannot sensibly be construed as plaintiff's counsel has suggested. As Professor James Hibdon stated, when shown the report by plaintiff's counsel: "Du Pont apparently had given a 13% discount which Mr. Gennett received, and what he is doing is passing on that discount in order that he can meet the Japanese competitor." Hibdon Direct, Tr. 29-30.

for this Circuit pointed out in *Atlas Building Products Co.* v. *Diamond Block & Gravel Co.*, 269 F.2d 950, 954 (10th Cir. 1959), *cert. denied*, 363 U.S. 843 (1960): "Antitrust legislation is concerned primarily with the health of the competitive process, not with the individual competitor who must sink or swim in competitive enterprise." Because plaintiff's costs were admittedly higher than those of the defendants, including Du Pont (McDonald, Tr. 586-587), plaintiff was uniquely vulnerable to competition. But, unfortunately for plaintiff, neither the antitrust laws "nor any social value compels the sheltering of an individual competitor, at the expense of the public interest, from the competitive process." *International Air Indus., Inc.* v. *American Excelsior Co.*, 517 F.2d 714, 721 (5th Cir.), *cert. denied*, 424 U.S. 943 (1975), quoted approvingly in *Pacific Engineering & Production Co.* v. *Kerr-McGee Corp.*, *supra*, 551 F.2d at 799; *accord, e.g., Hanson* v. *Shell Oil Co.*, 541 F.2d 1352, 1358-59 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977); *Atlas Building Products Co.* v. *Diamond Block & Gravel Co.*, *supra*, 269 F.2d at 956.

Contrary to plaintiff's contentions at trial, nothing in Section 2 of the Sherman Act prohibits "price changes which are within a 'reasonable' range, up or down." *Telex Corp.* v. *International Business Machines Corp.*, *supra*, 510 F.2d at 927. That was all that was shown here: a reasonable, and moderate, list price reduction by Du Pont in response to competitive conditions. As the court of appeals concluded recently in *Pacific Engineering & Production Co.* v. *Kerr-McGee Corp.*, *supra*, 551 F.2d at 795 quoting from *Union Leader Corp.* v. *Newspapers of New England, Inc.*, 180 F. Supp. 125 (D. Mass.), *modified*, 284 F.2d 582 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961): "'[I]ntending the natural consequences of acts which are in all respects lawful, does not constitute the 'exclusionary intent' **[27]** that is a prerequisite for finding a violation of section 2 [of the Sherman Act].'"

D. *Plaintiff Also Failed To Produce Substantial Evidence of Attempted Monopolization by Du Pont*

The fundamental defect of plaintiff's attempted monopolization claim against Du Pont is that it confuses competition, which the law encourages, with the kind of predatory conduct that is of concern under the antitrust laws. From the closing argument of plaintiff's counsel, one would suppose that it is unlawful to engage in price competition, to try to prevent continued inroads by expanding competitors, or to try to meet competition in the marketplace. Indeed, plaintiff's position at trial appeared to be that it was entitled to a "reasonable" share of the sales of refrigerant gas in the non-automotive replacement market—despite its admittedly high costs and operating problems.

Of course, that is not the law. The courts have been quite specific concerning the components of an unlawful attempt to monopolize. As noted above (discussion p. 5, *supra*), the essential elements of an attempted monopolization claim are proof of a specific intent to monopolize accompanied by a dangerous probability that monopoly power will be achieved. A showing of the requisite specific intent requires, in turn, proof that the defendant engaged in predatory conduct designed to control prices or destroy competition. *E.g., Pacific Engineering & Production Co.* v. *Kerr-McGee Corp., supra*, 551 F.2d at 797. The evidence at trial precludes a finding in plaintiff's favor on *any* of these elements.

At the outset, it is important to emphasize that the present record contains undisputed evidence of Du Pont's marketing objectives and goals as of 1971 when, according to plaintiff, Du Pont reduced its list prices in an effort to **[28]** monopolize the non-automotive replacement market for refrigerant gas. That evidence, reflected in Du Pont's Business Plan, was that Du Pont intended by 1976 merely to attempt to maintain against competitive inroads the 40 percent market share it had in 1971. Pl. Exh. No. 1113,

p. 28. A company with this intent can hardly be said to be attempting to monopolize the market.

Plaintiff simply ignored this evidence. It originally chose instead to base its predatory pricing allegation against Du Pont on the testimony of Mr. Scott Campbell, an accountant who had been retained by plaintiff. The choice proved to be disastrous. This effort to prove predatory pricing was a complete failure. Mr. Campbell testified on direct examination that he had been able to document sales below cost by Du Pont at two accounts—Tersco, Inc., and Waugh Brothers, Inc. But on cross-examination, Mr. Campbell was forced to admit that the charts on which his testimony was based were "inaccurate and misleading" in that (1) he had inaccurately plotted Du Pont's cost information, so that his charts purported to show sales below total cost when in fact Du Pont's offering prices always were above its total cost, and (2) he did not know whether Du Pont actually had made any sales at the price levels shown on the charts. Campbell, Tr. 886, 908-909. It is to put the matter charitably to say that plaintiff's attempted monopolization claim died with the testimony of Mr. Campbell.[7]

Plaintiff then retreated to the March 1971 list price reduction that Du Pont had implemented as showing Du Pont's specific intent to monopolize. As previously demonstrated, however, that reduction represented reasonable [29] competitive behavior by Du Pont: just as there was no evidence that that price reduction constituted an "unfair means" of competition, there is no basis for concluding that the reduction amounted to "predatory conduct" designed to control prices or destroy competition.

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[7] The fact that plaintiff failed even to show that it was competing with Du Pont for the business of Tersco or Waugh Brothers, or for the business of customers of those companies, only underscores the absurdity of the Campbell presentation.

Under settled law, "[p]ricing is predatory *only* where the firm foregoes short term profits in order to develop a market position such that the firm can later raise prices and recoup lost profits." *Janich Bros., Inc.* v. *American Distilling Co., supra,* 570 F.2d at 856 (emphasis added); *accord, e.g., Pacific Engineering & Production Co.* v. *Kerr-McGee Corp., supra,* 551 F.2d at 797. But what plaintiff has persistently overlooked is that not every price reduction signals that the firm is foregoing short-term profits for longer-term gain. The term "predatory pricing" does not encompass prices set above a firm's total cost—and it is exceedingly doubtful, under recent cases in this Circuit, whether prices set above a firm's marginal or average variable cost could ever be presumed predatory. *E.g., Pacific Engineering & Production Co.* v. *Kerr-McGee Corp., supra,* 551 F.2d at 795-97; *accord, e.g., William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.,* 1978-2 Trade Cas. ¶ 62,345 (9th Cir. 1978); *Murphy Tugboat Co.* v. *Crowley,* 1978-2 Trade Cas. ¶ 62,172 (N.D. Calif.); *Janich Bros., Inc.* v. *American Distilling Co., supra,* 570 F.2d at 858; *Hanson* v. *Shell Oil Co., supra,* 541 F.2d at 1358-59.

Thus, even if the inaccurate and misleading nature of Mr. Campbell's testimony had not been revealed on cross-examination, that testimony would have had little, if any, relevance to plaintiff's attempted monopolization charge because Mr. Campbell did not even purport to show any sales by Du Pont below its marginal or average variable cost. Campbell, Tr. 869. And, as noted, there was no evidence whatosever that any sales by Du Pont pursuant to the March **[30]** 1971 list price reduction were below total cost—much less marginal or average variable cost. Discussion at pp. 23-24, *supra.* There was, in short, a complete failure of proof at trial that Du Pont ever engaged in predatory conduct of the type required to show a specific intent to monopolize.

There is yet a further defect in plaintiff's attempted monopolization case against Du Pont. At no time following

plaintiff's entry into the refrigerant gas industry was there a "dangerous probability"—or, indeed, any probability at all—that Du Pont somehow would achieve a monopoly in the non-automotive replacement market for refrigerant gas. During the 20-year period following the expiration of the original fluorocarbon patents in 1949, Du Pont's share of the non-automotive refrigerant gas replacement market dropped continuously—from 100 percent in 1949 to approximately 40 percent during the 1969-1972 period. Hibdon Direct, Tr. 11-12. The cases are uniform in holding that where a company's market share is not close to the level recognized as the threshold of monopoly power (as Du Pont's was not), and it faces competition from strong and vigorous competitors, no "dangerous probability" exists that a monopoly will be achieved. *E.g., United States* v. *Empire Gas Corp., supra,* 537 F.2d at 296 (attempted monopolization claim rejected where defendant's market share only 50 percent and it had powerful rivals); *Diamond International Corp.* v. *Walterhoefer,* 289 F. Supp. 550 (D. Md. 1968) (51.1 percent of egg carton market was insufficient to show a dangerous probability of monopoly where defendant "vulnerable to competition").

In sum, plaintiff failed at trial to produce substantial evidence of either monopolization or attempted monopolization by Du Pont. In fact, the evidence at trial was such as to preclude, as a matter of law, findings **[31]** against Du Pont on those claims. That portion of the jury's verdict, as a consequence, cannot be sustained.

III. Plaintiff Failed To Produce Substantial Evidence of Conspiracy

The law in this Circuit, as elsewhere, is that a conspiracy claim under the Sherman Act cannot be sustained without proof of an agreement—that is, a "meeting of the minds" or "conscious commitment" among the alleged conspirators—to engage in conduct that violates the antitrust laws. *E.g., Webb* v. *Utah Tour Brokers Ass'n,* 568 F.2d

670, 674-75 (10th Cir. 1977); *Hanson* v. *Shell Oil Co., supra,* 541 F.2d at 1359; *Cackling Acres, Inc.* v. *Olson Farms, Inc.,* 541 F.2d 242, 244-45 (10th Cir. 1976), *cert. denied,* 429 U.S. 1122 (1977). Although a conspiracy can be established by circumstantial evidence (*see, e.g., Theatre Enterprises, Inc.* v. *Paramount Film Dist. Corp.,* 346 U.S. 537, 540-41 (1954)), the burden always remains with plaintiff to prove by a fair preponderance of the evidence both (1) that a conspiracy existed and (2) that, as a result of the conspiracy, plaintiff suffered measurable damages. Whether these elements are sought to be proved by direct or circumstantial evidence, the "essential requirement is that mere speculation be not allowed to do duty for probative facts * * *." *Galloway* v. *United States, supra,* 319 U.S. at 395.

The conspiracy charged in the present case is a conspiracy to reduce the price of refrigerant gas in the non-automotive replacement market in order to drive plaintiff out of business. Plaintiff admitted prior to trial, in answering interrogatories served by the defendants, that it had "no knowledge of any specific meeting, conversation or communication by which the claimed combination or conspiracy was formed or effectuated." Ans. to Int. 11(b). True to its word, plaintiff introduced no direct evidence at trial of any conspiracy directed toward it—or, indeed, of any **[32]** conspiracy involving the defendants having some different purpose. In short, the success of plaintiff's conspiracy claim was dependent throughout on plaintiff's adducing persuasive circumstantial evidence of the alleged conspiracy.

It is difficult to imagine a more complete failure of proof than occurred here. Although plaintiff had almost unlimited access to the files of all of the defendants for several years, and took numerous depositions, the present record contains no credible evidence—circumstantial or otherwise—of the conspiracy alleged by plaintiff. As plain-

tiff's case developed at trial, it became clear that the centerpiece of its conspiracy claim, as of its monopolization claims, was the list price reduction first implemented by Du Pont in March 1971. But the evidence showed conclusively that that price reduction was the product of vigorous competition rather than of any conspiracy.

Because of this failure of proof, plaintiff's counsel was forced to resort during closing arguments to unwarranted speculation, mischaracterization of the evidence and an appeal to the jurors' emotions and possible prejudices. Although these tactics apparently had their intended effect on the jury, they cannot be allowed "to do duty for probative facts." *Galloway* v. *United States, supra,* 319 U.S. at 395. The absence of substantial, credible evidence of a conspiracy means that the conspiracy verdict cannot be sustained.

A. *The List Price Reduction First Implemented by Du Pont in March 1971 Was the Product of Competition Rather Than of Conspiracy*

The reasons for, and some of the circumstances surrounding, the decision by Du Pont in March 1971 to reduce its list prices for refrigerant gas have already been discussed. See discussion at pp. 23-25 *supra*. As we showed [33] there, although Du Pont billed the reduction as one of 13 percent, it amounted in practical effect to an eight percent reduction for some customers and to no reduction at all for the approximately 50 percent of Du Pont's customers who previously had been buying refrigerant gas from Du Pont at the reduced price; the purpose of the list price reduction, according to the Du Pont executives who were responsible for it, was to stop the loss of sales and erosion of Du Pont's market share stemming from Du Pont's failure to remain competitive; finally, there was testimony establishing that the existence of Daiflon played no role in Du Pont's decision to reduce its list prices.

But even if it could be said that Du Pont's March 1971 list price reduction was somehow unreasonable in terms of its magnitude, or that the purpose of the reduction was to injure Daiflon, those conclusions would not help plaintiff's conspiracy claim. The question, so far as plaintiff's conspiracy allegation is concerned, is whether the reduction was arrived at and implemented pursuant to a conspiracy —an agreement—involving two or more of the defendants. In fact, evidence of the absence of a conspiracy is overwhelming.

Perhaps understandably, plaintiff's counsel did not refer during the closing arguments to the unrefuted evidence concerning the manner in which Du Pont chose to announce its March 1971 list price reduction to the trade. Mr. Wright explained that aspect of the March 1971 reduction as follows:

"Q. Did Du Pont initiate that price reduction?

"A. We did, indeed.

"Q. To what extent did you have any discussion with any competitor prior to the initiation of that price reduction?

[34] "A. None whatsoever. In fact, we didn't put it in writing, even, to make sure that we were able to get it to all the customers verbally at the appointed hour on March 15th, we hoped. We had very extensive meetings across the country, which we had all travelled very extensively for, to prepare everybody for the details of this move, this particular move, and the reasons for it.

"Q. To your knowledge, did anyone in DuPont discuss this price reduction with any of your competitors?

"A. To our knowledge, it was a complete surprise to all of our competition, which was precisely the move we wanted to make."

Wright, Deposition 195; *see also id.* at 187-188, 194-199; O'Donnell, Deposition 91.

Plaintiff made no effort at trial to explain why Du Pont made such elaborate efforts to communicate privately to individual customers its decision to reduce its list prices. Obviously, if Du Pont had arrived at the decision pursuant to a conspiracy with the other defendants—and the other defendants, as a consequence, already were aware of the decision—the secrecy would have served no purpose. The manner in which Du Pont chose to inform its customers of the reduction is thus inconsistent with any notion of a conspiracy.

Moreover, although plaintiff's counsel asserted repeatedly at trial that the other defendants moved "simultaneously" to meet Du Pont's list price reduction (*e.g.*, Hibdon Cross-Examination, Tr. 4), the evidence is squarely to the contrary. Union Carbide, for example, did not decide to meet Du Pont's list price reduction until late May 1971 —some 60 days after the effective date of Du Pont's reduction. Pl. Exh. No. 4589, p. 7. It was not until May 19, 1971, that Allied Chemical adjusted its list prices downward to meet the Du Pont competition (Pl. Exh. No. 514), although **[35]** Allied had begun to meet the reduction at individual accounts by the end of March. Pl. Exh. No. 1042. Kaiser did not alter its list prices until October 1971, making the reductions effective as of September 1, 1971. Sorensen, Deposition 93-94; Pl. Exh. No. 3719. As for Pennwalt, the only evidence of the timing of Pennwalt's decision to reduce its prices was a Du Pont trade report, written by a salesman after a survey of customers in the field, reporting to Du Pont management as of March 30, 1971, that he had heard "[n]o word on Pennwalt as to their reaction to our discount arrangement."[8] Pl. Exh. No.

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[8] To remedy this glaring lack of evidence, plaintiff's counsel grossly and inexcusably misread this document in his closing to the jury as "No word yet *from* Pennwalt." Crawford Tr. 1482, Line 10 (emphasis supplied).

1042. Finally, Racon reacted quickly to Du Pont's surprise across-the-board price decrease of March 15, 1971. Racon's management, while admittedly still somewhat confused about the extent of "the recent price moves", decided even before the situation was "completely clarified" to move to meet this price competition "retroactive to 3-15-71" and formally instructed its sales force by memorandum dated April 1, 1971, to "move promptly to meet this competition (where offered). . . . Do not lose any business!" Pl. Exh. No. 5024.

There is absolutely no evidence that any defendant company knew either that the price decrease was coming or Du Pont's reason for deciding to reduce prices.

The evidence thus belies plaintiff's assertions that the defendants reduced their list prices "simultaneously" on March 15, 1971. As word of the Du Pont list price reduction spread throughout the industry, the other defendants decided individually—over a period of almost six months —to meet the Du Pont reduction. There also was substantial evidence indicating why the other defendants had little choice but to reduce their list prices in response to Du Pont's actions.

[36] One of plaintiff's expert witnesses, Dr. Benton Gup, testified, for example, that as an economist, he would expect the price of refrigerant gas to "be the same throughout the industry." Gup, Tr. 1075. Following that statement, the following exchange occurred:

> "Q. Well, is this charging of identical prices, that you presuppose, a perfectly normal competitive reaction?
>
> "A. For homogeneous products?
>
> "Q. Yes.
>
> "A. Yes.

"Q. Why is that?

"A. It's a natural market mechanism among competitors."

Gup, Tr. 1076. Dr. Gup then was asked what would happen if one of the domestic manufacturers decided to try to sell its refrigerant gas at a price above the price being charged by its competitors. Dr. Gup responded: "He [would] lose market share." Gup, Tr. 1076-1077. Finally, Dr. Guy agreed that, if one manufacturer lowered its price, the other manufacturers would be forced to lower their prices "pretty quick" as well. Gup, Tr. 1077. *Accord, e.g.*, Jadlow, Tr. 1217; Hibdon Direct, Tr. 24-25; Carter, Tr. 113.

The validity of the unanimous expert opinion on this matter, and of its applicability to the refrigerant gas industry, is dramatically illustrated by an internal Union Carbide document entitled "The Fluorcarbon Market—Competitive Situation and UCC Pricing Strategy 1967 Through 1971." Pl. Exh. No. 4589. As already noted, Union Carbide did not respond to Du Pont's March 1971 list price reduction until late May 1971. Pl. Exh. No. 4589 reveals that this two-month delay had a devastating effect on Union Carbide's sales:

> "Competitive price action in the Replacement Refrigerants (cylinders) rapidly increased in intensity in the [37] early part of 1971 as the refrigeration season got underway. The UCC position through the first part of the season was to reject all competitive price offers in an effort to maintain the Pennwalt January, 1971 price increase. We were forced to retreat from this position late in May, 1971 as it became very obvious that we were losing position at a catastrophic rate. As a result, UCC lost market share in the Replacement Market by the end of 1971 (about 2%)."

The sales losses that Union Carbide suffered because of its failure to respond quickly to Du Pont's March 1971 list price reduction amounted to some 5,000,000 pounds of refrigerant gas in 1971 alone. Napoli, Deposition 66. This is two and ½ million pounds more than Daiflon sold during its entire four-year existence. Def. Exh. No. 91. To suggest that Union Carbide delayed responding to Du Pont's list price reduction until the effects on Union Carbide's sales were "catastrophic," but that Du Pont's actions nonetheless were pursuant to a conspiracy with Union Carbide and the other defendants, borders on the ludicrous. *See also* Sorensen, Deposition 91-94.

If plaintiff had made an analysis of the refrigerant gas industry before deciding to begin importing refrigerant gas from Japan, rather than simply assuming that the industry had been and would continue to be a "high profit" business for everyone involved (Carter, Tr. 104),[9] **[38]** it

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[9] During the final portion of his closing argument, plaintiff's counsel referred to Pl. Exh. No. 1311 as showing

> "[o]bviously high profits. There is no—they don't refute it. It's $3.19 profit they were making on a product they were selling for $3.96. Why didn't they say something about that? It shows the high profits. * * * " Crawford, Tr. 44.

What plaintiff's counsel failed to tell the jury was that (1) the product on which Du Pont had realized a profit of $3.19 per pound was F-13, a product not involved in this case (Daiflon sold only R-11, R-12 and R-22); (2) Du Pont had a patent covering F-13, so that it could not be manufactured by any other company; and (3) the purchaser in the transaction referred to by counsel was the Linde Division of Union Carbide. Thus, counsel's references to Pl. Exh. No. 1311 were both misleading and prejudicial—and the portion of the exhibit counsel relied upon is itself irrelevant to this case.

The only evidence at trial of the profits realized by the defendants on R-11, R-12 and R-22 (the products at issue here) in the non-automotive replacement market was the testimony of Professor Hibdon. Professor Hibdon testified that there was no evidence of the defendants making monopoly profits and, in fact, there was evidence to the contrary. Hibdon, Re-Direct Tr. 43.

would have discovered that there was nothing unique about the list price reduction made by the defendants at various times in early 1971. As demonstrated by the testimony of Professor James Hibdon, actual transaction prices for fluorocarbon products, including refrigerants, had been declining precipitously during the entire ten-year period *preceding* plaintiff's entry in the business. Hibdon Direct, Tr. 20. The primary reason for this price deterioration was, according to Professor Hibdon, the substantial overcapacity that existed. Hibdon Direct, Tr. 20-21. Accord *e.g.*, Wright Deposition 188. Indeed, the price declines were most severe during the 1960s in refrigerant grade 22, which is the grade of refrigerant gas on which plaintiff chose to concentrate its sales efforts. Hibdon Direct, Tr. 22.

In sum, there is no evidence that the list price reduction about which plaintiff has complained was other than a normal, and entirely lawful, competitive reaction to market realities. Plaintiff's failure to produce substantial evidence to the contrary means that the conspiracy verdict in this case cannot stand. As noted, plaintiff's position at trial was that the effect of the defendants reducing their list prices in early 1971 was to "stop" plaintiff's sales. Carter, Tr. 196. According to plaintiff's counsel, by June 1971 "[t]hey were out, and they realized they were out, and the bank advised them to go through whatever they called it, an orderly liquidation or something of that nature." Crawford, Tr. 1388. Even if **[39]** these assertions are accepted at face value, and the admittedly "disastrous" impact on plaintiff's business of the import surcharge that was imposed in August 1971 is ignored (Def. Exh. No. 9), there simply is no basis for finding that plaintiff's failure was the result of conspiratorial conduct by the defendants.

B. There Was No Other Credible Evidence At Trial of the Alleged Conspiracy

The other pieces of evidence that plaintiff relied upon do not, either singly or in combination, provide substan-

tial evidence to support plaintiff's conspiracy claim. Indeed, none of this evidence warrants more than summary analysis.

1. *The opportunity to conspire.* Plaintiff attempted to make much at trial of the fact that representatives of various of the defendants sometimes attended trade association meetings. Attendance at those meetings, according to plaintiff, means that the defendants had the "opportunity" to conspire.[10] Crawford, Tr. 1469-1482.

But there was no evidence that Daiflon, or Japanese refrigerants, was discussed at any trade association meeting attended by representatives of one of more of the defendants. *See, e.g.,* Napoli, Deposition 220-221; Ward, Deposition 107-108; Wright, Deposition 205; Regan, Deposition 84-86. Indeed, there is no reason to believe that attendance at trade association meetings gave the defendants any more "opportunity" to conspire than did the fact that executives of the defendants, responsible for the sale of refrigerant gas, each presumably had access to telephones.

[40] 2. *Market intelligence activities.* A substantial amount of trial time was consumed by plaintiff's effort to prove that each of the defendants attempted to gather information about Daiflon, both to determine whether Daiflon's Japanese supplier was violating federal anti-dumping laws and to obtain a sense of the nature and size of Daiflon's operations. There is no dispute that some of these activities occurred, even if

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[10] Mr. McDonald acknowledged that representatives of A. Y. McDonald Company attended trade association meetings. McDonald, Tr. 570. Mr. Adams acknowledged that he had attended trade association meetings in the past. Adams, Tr. 721.

they were not always successful.[11] But neither is there any basis for suggesting that such activities are other than a normal, and entirely appropriate, aspect of the competitive process.

Defendants had a constitutional right to investigate the possibility of a dumping violation by Daiflon's Japanese supplier, even though the exercise of that right might have been intended to harm Daiflon. 19 U.S.C. § 160 *et seq.; Eastern R. R. Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 135-45 (1961). Similarly, true competition could not exist if individual companies were required to close their eyes to the activities of their competitors, or risk violating the federal antitrust laws. And there is no evidence at all tending to show that the defendants shared among themselves information as to Daiflon's costs, prices or methods of distribution. Such market intelligence activities are indicative of the vigorous competition **[41]** that existed in the refrigerant gas industry during the period encompassed by this case.

3. *Distribution patterns.* A significant portion of the exhibits that plaintiff offered at trial were letters from certain of the defendants declining to sell refrigerant gas directly to the individuals or companies involved. Plaintiff's counsel repeatedly used the phrase "Dear John letters" to refer to these exhibits, suggesting that the exhibits somehow revealed improper conduct by the defendants. *E.g.*, Crawford, Tr. 1449-1452.

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[11] An illustration of the deficiencies of defendants' market intelligence activities is Pl. Exh. No. 4552. As of April 28, 1971—fully one month after defendants are alleged to have conspired to reduce the price of refrigerant gas to drive Daiflon out of business—at least two of the alleged co-conspirators were unaware of Daiflon's source of supply. Indeed there is a suggestion in the exhibit that one of the other domestic manufacturers (a purported co-conspirator here) was supplying refrigerant gas to Daiflon.

In fact, each of the defendants is entitled by law to determine with whom it wishes to do business. There was absolutely no evidence that the defendants communicated among themselves concerning the selection of wholesale outlets for their refrigerant products.[12] [42] Nevertheless, plaintiff's counsel persisted during his examination of witnesses, as well as in closing arguments, in referring to "their [—the defendants'—] approved list," implying that there was some common list approved by defendants pursuant to agreement among them. *E.g.*, Crawford Rebuttal, Tr. 28. Objections to this tactic did not deter counsel from continuing this course of purposefully misleading the jury. *E.g.*, Hibdon Direct, Tr. 8-13. Although the jury may have been unable to appreciate that the "Dear John

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[12] It is instructive in this regard to recall the deposition testimony of Mr. Harold Gresham, which was often referred to by plaintiff's counsel during closing arguments as showing that the defendants had "allocated" the refrigerant gas replacement market among themselves. *E.g.*, Crawford, Tr. 1498-1503. Although Mr. Gresham used the word "allocation" in his deposition (Gresham, Deposition 16), it is apparent that Mr. Gresham's definition of that word bore no relation to the definition supplied by plaintiff's counsel or to the kind of market allocation that is of concern under the antitrust laws. When asked to define what he meant in using the word "allocation," Mr. Gresham responded:

> "Well, there's [a] certain percent of the market that Kaiser was getting, and it was my impression from management that we would try to maintain that percent of the market and not really go all out with any particular account and try to change it. * * * It was my understanding, now, that with Kaiser we expected, or we wanted a much larger percent of the market, and that if we went after a much larger percent of that, that we would suffer pricewise * * *." Gresham, Deposition 179.

In addition, Mr. Gresham stated specifically that he had no reason to believe that any of the decisions made by his superiors at Kaiser were based on agreements, understandings or discussions with any of the other manufacturers of refrigerant gas. Gresham, Deposition 183.

letters" do not constitute evidence of a conspiracy, the fact that plaintiff felt compelled to emphasize the letters is indicative of the weakness of plaintiff's case.

Furthermore, although plaintiff attempted at trial to minimize the significance of the import surcharge and the subsequent devaluation by suggesting that "it ran out of customers, not gas" (Crawford, Tr. 546-547; McDonald, Tr. 547, 609) it made no effort to explain why it ran out of customers or on what basis defendants could be held responsible for that development. Plaintiff made no effort to establish, for example, that "it ran out of customers" in June 1971 because the defendants began, as part of the alleged conspiracy, to sell refrigerant gas directly to customers of Daiflon to whom they previously had refused to sell.

4. *Late 1972 price increases.* Plaintiff's counsel also argued that the list price increases that occurred in October 1972, at about the same time that Daiflon made its last sale of refrigerant gas, indicate that the defendants waited until Daiflon had been excluded from the business before permitting prices to increase. Crawford, Tr. 17-19. There is no credible evidence to support this theory.

[43] Mr. Don Napoli of Union Carbide, which initiated the October 1972 price increase, testified that the Union Carbide business team had begun to discuss in late 1971 and early 1972 the possibility of raising Carbide's list prices in October 1972, after the busiest portion of the air conditioning season had ended. Napoli, Deposition 53-54. The reason for Union Carbide's decision to increase its list prices at that time, as explained by Mr. Napoli, was "to attempt *on our own* * * * to cover increasing costs consistent with Federal Regulations." (Emphasis supplied.) Napoli, Deposition 203.

Mr. Napoli also testified that, because the other defendants decided to continue to sell their refrigerant gas at prices below Carbide's increased list prices, Carbide was soon forced to rescind the increase in order to avoid losing sales:

> "Q. Why did you find it necessary to change your price schedule that you had just issued in October?
>
> "A. Because after competition announced their price decreases, and other competitors did likewise, we found ourselves in a position where we would lose all our business as a result of feedback we got from our customers, saying they would no longer buy from us." Napoli, Deposition 196.

In short, there was no evidence that the list price increases announced in the Fall of 1972 were conspiratorial. And there is no evidence that any defendant's decision to increase list prices at that time was motivated or influenced by Daiflon's exit from the market. Given this complete failure of proof with regard to the 1972 price increases, the fact of the increases does not permit any inference that the 1971 list price reduction, about which plaintiff complains, was arrived at pursuant to a conspiracy or that it was directed at plaintiff.

[44] In sum, this case has been pending in the federal courts, in one form or another, for over seven years. Plaintiff was given every opportunity during that time to search through each of the defendants' files, to take deposition testimony from employees of the defendants, and to discover any pertinent evidence that might be possessed by non-party witnesses. Despite this opportunity plaintiff has failed miserably to produce credible evidence of any conspiracy. It has fared no better with its belated monop-

olization and attempted monopolization claims against Du Pont. The only result, consistent with the legal principles governing plaintiff's substantive claims, would be to enter judgment n.o.v. for the defendants.

IV. All Defendants Are Entitled To Judgment Because of Plaintiff's Failure To Prove Impact and Damages

Going into the trial, Daiflon had taken the position that its only damages are the fair market value of its allegedly destroyed business, as calculated by Dr. Benton Gup. This damage claim was set out in plaintiff's Supplemental Response to Defendants' Third Set of Interrogatories, filed in July 1977.[13] Dr. Gup's damage computation was asserted to be the sole basis for Daiflon's damages claim by Mr. Carter during his deposition in November 1977 (page 13), and this deposition testimony was reaffirmed by Mr. Carter at trial. Carter, Tr. 275.

As we will show, however, for a number of reasons, Dr. Gup's damage computations—the exclusive basis of Daiflon's claim for damages—are legally insufficient to permit any damage award.

[45]

A. *Gup Was Not Competent To Introduce the Conclusions of Another Expert (Iskander)*

On the basis of his limited expertise, all that Dr. Gup could put before the jury were his ranges of various assumed values (such as "minimum," "most likely" and "maximum" market share, etc.), which are shown in the chart entitled "Financial Model Used to Determine Value of Daiflon, Inc. Def. Exh. No. 79. To get from this collection of

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[13] The method and numbers used in that interrogatory answer are those that went into Dr. Gup's trial testimony and into the two exhibits (Def. Exh. Nos. 79 and 80) that he used to illustrate his testimony.

numbers to the claimed most likely fair market value of Daiflon of $2.96 million, Dr. Gup employed a computer programmer, Mr. Fadel Iskander, who wrote and ran the program that resulted in the $2.96 million figure that Dr. Gup then proffered as his own. However, Dr. Gup admitted that he had simply relied on Iskander, that he (Gup) had not checked the program, and that he (Gup) was in fact not even competent to read the program. Gup, Tr. 962, 966, 1021, 1028.

A report prepared by one expert (Iskander) cannot just be adopted and proffered by a different expert who is on the stand (Gup). *6816.5 Acres of Land* v. *United States*, 411 F.2d 834, 839-40 (10th Cir. 1969). This is particularly so when the absent expert's report is prepared for the specific purpose of the litigation. See also the precisely in-point discussion of Rule 703 of the Federal Rules of Evidence in *Carlin* v. *Zimmer Manufacturing Co.*, —— F.Supp. —— (E.D. Pa. 1978), a copy of which is attached for the Court's convenience.

B. *Gup's Damage Theory Improperly Assumed a Daiflon Sales Price Prevailing During Defendants' Alleged Conspiracy To Raise Prices*

A key assumption made by Dr. Gup in valuing Daiflon was that Daiflon would most likely be getting a price of 60¢/lb. in the marketplace for its products. If that assumption cannot stand, Dr. Gup's assumption as to net income [46] (putting to one side the separate infirmities which that net income figure has) of course cannot stand either.

It is absolutely clear that no claim for damages can validly be based on this 60¢/lb. price. This is because, in assuming that in the base year (1972) Daiflon would be getting the same price as the defendants (this being a homogeneous product), Dr. Gup also assumed that this 60¢/lb. price was then being charged by the defendants pursuant to a conspiracy to keep the price *as high* as 60¢/

lb. Gup, Tr. 1069-1070. A theory of damages that measures what plaintiff would have done by reference to the beneficial, protective umbrella of defendants' alleged conspiracy is legally impermissible. *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359, 376-78 (1927). *See also Murphy Tugboat Co.* v. *Crowley, supra*, 1978-2 Trade Cases ¶ 62,172 (N.D. Calif.).

C. Gup's Damage Theory Also Falls Because He Was Completely Wrong About One of The Most Important Facts—The Market Share That Daiflon Actually Had Attained—Underlying His Theory

Dr. Gup's damage theory also is invalid because he was totally wrong about what he acknowledged was one of the most important facts underlying his assumption that Daiflon would most likely have had 2 percent of the market. He acknowledged that market share is a "critical" number in valuing a company. Gup, Tr. 1089. And he admitted that "one of the most important facts" in coming up with the 2 percent "most likely" market share assumption was his belief that Daiflon actually had attained a 2 percent share of the market. Dr. Gup stated that he had seen the 2 percent figure in some balance sheet. Gup, Tr. 1089-1094.

But Dr. Gup was absolutely and incontrovertibly wrong about the market share Daiflon had attained. On his own figures, 2 percent of the relevant market is 2.84 million pounds per year. Def. Exh. Nos. 74 and 79. Daiflon [47] never attained more than about one third of that. And the balance sheet that Dr. Gup was referring to exists only in his imagination.

Mr. Carter acknowledged that Daiflon's sales never amounted to more than somewhere in the range of $\$\frac{1}{2}$ million a year. Carter, Tr. 266. Daiflon's financial statement for the fiscal year ending February 28, 1971 (Pl. Exh. No. 9), shows refrigerant sales of $417,475. Its financial statement for the eight months ending October 31, 1971 (Pl. Exh.

No. 14), shows sales of $393,467. Even accepting Dr. Gup's 60¢/lb. figure, this means that Daiflon never had more than about one third of what Dr. Gup saw on his imaginary balance sheet.

Because Dr. Gup was so completely wrong about one of the admittedly most important facts underlying an admittedly critical factor in his calculations, Dr. Gup's entire theory is simply worthless.[14]

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[14] It is clear that Dr. Gup confused fact with wishful thinking. The only place anything like Dr. Gup's market share figure for Daiflon appears is not in a financial statement showing actual accomplishment, but in the projected statement of income for the period March 1, 1971, through February 28, 1972. Pl. Ex. No. 17. This was the "projection" prepared by Mr. Carter for the purpose of inducing the bank in Galveston to lend Diaflon money (Carter, Tr. 265), and it cannot be used as an alternative basis for damages.

This projection says that one million pounds of R-12 and two million pounds of R-22 would be sold at 50¢/lb. and 75¢/lb., respectively, for a total of $2 million and net income of $200,897.12. A few simple calculations conclusively show the absurdity of that "projection."

The 50¢-75¢ sales prices add up to a weighted price of 66.67¢/lb. $\frac{[(75 \times 2) + 50]}{3}$. That of course was not achieved for the period in question, as price attrition set in. However, Dr. Gup already has told us on behalf of Daiflon that the proper price would have been 60¢/lb. Accepting that for the sake of argument, and the projected sales volume of $2 million, reduces the projected net income of $200,897.12 by about $180,000. But that is before the surcharge and the devaluation! Applying the 10 percent surcharge to the $1,336,860 cost of goods sold shown in Pl. Exh. No. 17, results in a further subtraction from net income of $133,686, putting Diaflon about $113,000 in the red. Of course, the 17 percent devaluation drives the figure even deeper into the red. And that is just from focusing on the projected sales price—without regard to the utter groundliness of the sales volume projection.

D. *Gup's Damage Theory Rests on the Patently Untenable Assumption That Daiflon Would Have Performed Like a Broad Spectrum of Big American Companies in All Their Operations*

Each of the above reasons is, by itself, sufficient to require the entry of judgment n.o.v. because each shows Daiflon's damage claim to be the kind of speculation the law does not permit. But there is another thing about Daiflon's damage claim that requires the entry of judgment n.o.v. And that shows that the claim is worse than just speculation—it is in the realm of fantasy.

[48] The cornerstone of Dr. Gup's opinion concerning the value of Daiflon was the assumption that Daiflon would most likely have had a net income of six percent on its sales. To get there, Dr. Gup simply pulled himself up by his bootstraps and assumed that Daiflon would have performed just as well as a broad spectrum of big American companies, some of them in the chemical business, have performed in all of their operations. Gup, Tr. 1103-1109. Pressed on the justification for his assumption, Dr. Gup admitted:

> "Q. And the only points of similarity that you saw there were both are in the chemical business, that is, Daiflon and these other people, and both are industrial outfits?
>
> A. Yes.
>
> Q. And that's all?
>
> A. Yes."

Gup, Tr. 1109. Not only that, but Dr. Gup admitted that the price Daiflon had to pay its Japanese supplier to obtain refrigerant gas was not a factor in his assessment of the worth of Daiflon! Gup, Tr. 1114.

[49] There is no way a verdict based on that can stand. While plaintiff is entitled to prove the amount of its dam-

ages through reasonable estimates, these estimates cannot be based on mere possibility or speculation. *Webb* v. *Utah Tour Brokers Ass'n*, 568 F.2d at 677; *Cackling Acres, Inc.* v. *Olson Farms, Inc.*, 541 F.2d at 246. Particularly in point is *Fargo Glass & Paint Co.* v. *Globe American Corp.*, 201 F.2d 534 (7th Cir. 1953). There plaintiff distributor had a lot better damage case than Daiflon has here—it was trying to measure its profits according to the profits of the distributor who had succeeded it—and that particular plaintiff still lost. The Court aptly stated:

> "The profits made by Maytag are not the proper measure of plaintiff's damages. There is no evidence to justify the assumption that plaintiff would have sold the same number of Globe ranges that Maytag sold, or that it would have realized the same profit on sales it made. The record is silent as to the comparative cost of doing business by Maytag and plaintiff. Damages to be recoverable must be actual not speculative remote or uncertain." 201 F.2d at 540-41.

To the same effect is *Loew's, Inc.* v. *Cinema Amusements, Inc.*, 201 F.2d 86, 91-92 (10th Cir. 1954).[15]

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[15] Although not really necessary in view of the other compelling reasons for judgment n.o.v., we list here some other significant unfounded and preposterous assumptions that Dr. Gup made, which make his theory legally impermissible speculation.

To bump up his assumed most likely market growth rate to 12 percent, Dr. Gup used the 20 percent growth figure given in the Du Pont business plan for the automotive aftermarket. Gup, Tr. 1051. But he had to admit that he had no idea of the nature of the buyers and sellers in that aftermarket (Gup, Tr. 1051), and that he had no evidence to support his assumption that Diaflon would have expanded into the automotive aftermarket (Gup. Tr. 1054). In coming up with the most likely value of ten years over which to value Daiflon, Dr. Gup admitted, for example, that his number of years was based on his assumption that Diaflon's products could continue to come from Japan (Gup, Tr. 1065), which of course was not only an unfounded but a disproved assumption. In picking only 5.5 percent as the most likely rate by which to

[50]

E. *Even If Gup Had Been Right in Everything Else, He Did Not Take Into Account the Import Surcharge and the Devaluation of the Dollar, Which Eat Up All of Daiflon's Assumed Net Income With Something To Spare*

Dr. Gup's damage theory also fails because the 6 percent net income, which he assumed Daiflon would have made beginning with his 1972 base year, would in fact have been eaten up with a good bit to spare by the 10 percent import surcharge and the subsequent 17 percent devaluation of the dollar against the yen.

Taken through a series of simple mathematical steps, Dr. Gup acknowledged that, at his assumed 60¢/lb. sales price and 6 percent net income, Daiflon's per pound net income would have been 3.6¢/lb. Gup, Tr. 1123. Dr. Gup further acknowledged that, whichever of Daiflon's answers to defendant's cost interrogatories is used, Daiflon's purchase price for Japanese gas (exclusive of importer's fees, freight in, customs and duty) was something over 38¢/lb.[16] Gup, Tr. 1124-1132.

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discount Diaflon's future net income to arrive at present worth, Dr. Gup admitted that this was the rate appropriate to an investment in a broad spectrum of big American companies (Gup, Tr. 1096) and that this number was based on his bare assumption that Diaflon would grow like these other companies (Gup, Tr. 1097-1098). This is even though in the spring of 1971 Diaflon was paying Mr. McDonald 9 percent on his loan (McDonald, Tr. 555, 565-566). And Dr. Gup admitted that his theory necessarily means that there is no chance in the world that Daiflon would have made less than 4 percent net income. Gup, Tr. 1119. He also admitted that he did not consider the possibility that Daiflon was not worth anything. Gup, Tr. 1027.

[16] This was on the basis of Dr. Gup's assumption that Daiflon's product mix would have been 60 percent R-22 and 40 percent R-12. Gup, Tr. 1125. Mr. Carter and Mr. Adams both estimated that Daiflon's product mix was about 65%-35% in favor of the more costly R-22. Carter, Tr. 321; McDonald, Tr. 716. And the Arthur

[51] Dr. Gup admitted that when he had done his calculations, he had not taken into account nor even known about the import surcharge, and that he also had not known about nor had taken into account the devaluation of the dollar. Gup, Tr. 1121-1123. He was forced to acknowledge the inescapable proposition that the 10 percent import surcharge would have raised Daiflon's costs by 3.8¢/lb., eating up his assumed 3.6¢/lb. net income. Of course Dr. Gup also had to acknowledge, and did acknowledge, that if the 10 percent surcharge was big enough to do that, the 17 percent devaluation of the dollar against the yen would certainly have been enough to do that. Gup, Tr. 1132-1133.

But Daiflon's case is even worse than that. The 1-1.5 million pounds which Daiflon had in its tanks when the surcharge came in, McDonald Tr. 584-85, would not last forever. And Daiflon was not going to get more. Def. Exh. No. 9.

Gup was forced to acknowledge that he had assumed in his valuation of Daiflon that Daiflon would continue to distribute Japanese gas over the period of his valuation. Gup, Tr. 1065. Notwithstanding Daiflon's implication at trial that this 1-1.5 million pounds would last forever, the incontrovertible fact is that the poundage on hand is only around one-half of Gup's assumed 2.84 million pounds of sales in the first year of his valuation—a valuation that spanned 5-15 years of income, with 10 years most likely. The jury's damage award necessarily assumed the impossible—that Daiflon would have remained in business after the gas on hand ran out.

Young & Co. printout of Daiflon's sales showed about 71 percent R-22, 28 percent R-12, and one percent R-11. Def. Exh. No. 91. Accordingly, the impact of the surcharge and of the devaluation would have been even more severe than we get from Dr. Gup's understatement of the proportion of the costlier gas.

CONCLUSION

Plaintiff failed to produce substantial evidence on every one of the essential elements of its necessary [52] proof. Defendants accordingly are entitled to judgment not withstanding the verdict.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of May, 1979, I served upon all counsel of record in this case a copy of the above designated pleading.

/s/ D. KENT MEYERS
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[ATTACHMENT DELETED IN PRINTING]

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Civil No. 72-C-483-B

DAIFLON, INC., *Plaintiff*,

v.

ALLIED CHEMICAL CORPORATION, et al., *Defendants*.

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR NEW TRIAL

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Simultaneously herewith, defendants have moved for judgment notwithstanding the verdict (n.o.v.) pursuant to Rule 50(b) of the Federal Rules of Civil Procedure. It is defendants' primary position that judgment should be entered in their favor as sought by that motion.

Alternatively, defendants hereby move for a new trial pursuant to Rule 59 of the Federal Rules. It is defendants' position that if judgment is not entered in their favor pursuant to Rule 50, a new trial should be granted pursuant to Rule 59. Even if their Rule 50 motion is granted, defendants urge that the Court, as an alternative, grant a new trial pursuant to Rule 59 so that the Court of Appeals will be in a position to review this Court's rulings as to both motions simultaneously.

I. The Applicable Standards

Under Rule 59, the Court has broad discretion to see to it that its final judgment does not represent a miscarriage of justice. As stated in 11 Wright & Miller, Federal Practice §§ 2801 and 2803:

> "Rule 59 recognizes the common law principle that it is the duty of a judge who is not satisfied with the

verdict of [2] a jury to set the verdict aside and grant a new trial * * *. 'To the federal trial judge, the law gives ample power to see that justice is done in causes pending before him; and the responsibility attendant upon such power is his in full measure. While according due respect to the findings of the jury, he should not hesitate to set aside their verdict and grant a new trial in any case where the ends of justice so require.' [quoting Judge Parker in *Aetna Casualty & Surety Co.* v. *Yeatts*, 122 F.2d 350, 354 (4th Cir. 1941)].

* * *

"Rule 59 gives the trial court ample power to prevent what he considers to be a miscarriage of justice. It is his right, and indeed his duty, to order a new trial if he deems it in the interest of justice to do so * * *. Ultimately the motion [for a new trial] invokes the sound discretion of the trial court, and appellate review of its ruling is quite limited.

Rule 59 of the Federal Rules does not itself enumerate all possible grounds that may require the granting of a new trial. But as Wright and Miller make clear, such grounds include any matter relating to the ultimate fairness of the judgment sought to be overturned:

"[T]he rule is stated in broad terms. * * * [T]he general grounds for a new trial are that the verdict is against the weight of the evidence, that the damages are excessive, or that for other reasons the trial was not fair, and * * * out of substantial errors in the admission or rejection of evidence or the giving or refusal of instructions. The absence of a listing of specific grounds should not obscure the governing principle. The court has the power and duty to order a new trial whenever, in its judgment, this action is required to prevent injustice." *Id.* at § 2805.

The power of a federal judge "to grant a new trial on the ground that the verdict was against the weight of the evidence is clear." *Id.* § 2806. As stated in the leading case of *Aetna Casualty & Surety Co.* v. *Yeatts, supra,* 122 F.2d at 352-53:

> "On [a motion for a new trial] it is the duty of the judge to set aside the verdict and grant a new trial, if he is of **[3]** the opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict. The exercise of this right is not in derogation of the right of trial by jury but is one of the historic safeguards of that right."

Cited with approval in *Holmes* v. *Wack,* 464 F.2d 86, 88 (10th Cir. 1972), and in *Tidewater Oil Co.* v. *Waller,* 302 F.2d 638, 643 (10th Cir. 1962).

The question then is one of weighing the evidence to reach a just result. Even though substantial evidence may support a verdict, which we strenuously deny in this case, a new trial should be ordered if the verdict is against the weight of the evidence. As explained by Wright and Miller:

> "[O]n a motion for a new trial—unlike a motion * * * for judgment notwithstanding the verdict—the judge may set aside the verdict even though there is substantial evidence to support it. He is *not* required to take that view of the evidence most favorable to the verdict-winner. * * * [T]he judge is free to weigh the evidence for himself." *Id.* § 2806 (emphasis added).

No precise verbal formula has evolved as to how the evidence should be weighed, but certain principles are apparent. First, and obviously, the fact that the jury rendered a verdict must be given due weight, particularly in

litigation involving relatively simple issues "easily comprehended by any intelligent layman." Wright & Miller, *supra*, § 2806. By the same token, however, the trial judge should scrutinize the verdict more closely if the "trial is long and complicated and deals with a subject matter not lying within the ordinary knowledge of jurors." *Ibid.*; *Lind* v. *Schenley Industries Inc.*, 278 F.2d 79, 90-91 (3d Cir. 1960). As the court observed in entering judgment n.o.v. and, alternatively, granting a new trial in *Tomac, Inc.* v. *Coca-Cola Co.*, 418 F. Supp. 359, 361 (C.D. Cal. 1976):

[4] "Much has been said about the inadequacy of the jury system to accommodate itself to some of the complexities of modern litigation. Even the Supreme Court has confessed its problems. It may be true that jurors are best able to pick from contested facts in a bank robbery case or a narcotic violation, but there seems less logic in entrusting to laymen economic and legal problems which are wound in strange and confounding theories. * * * [The issues presented in such suits are] too important and far reaching to be left to the misconceptions and misunderstandings of inexperienced jurors. [And, since] the verdict shows that this jury did not understand the economic facts that were important to a correct result, [it is set aside]."

Second, experience gained since the Supreme Court first permitted six-person juries in civil cases in *Colgrove* v. *Battin*, 413 U.S. 149 (1973), indicates that verdicts rendered by such small juries are more likely to be incorrect than twelve-person verdicts. As explained by Justice Blackmun, announcing the judgment of the Court in *Ballew* v. *Georgia*, 435 U.S. 223, 232-39 (1978), empirical studies conducted since 1973 have demonstrated: (1) "that progressively smaller juries are less likely to foster effective group deliberation," which leads at some point to "inaccurate fact finding and inaccurate application of the common

sense of the community to the facts"; (2) "as juries decrease in size * * * they are less likely to have members who remember each of the important pieces of evidence or argument"; and (3) "the smaller the group, the less likely it is to overcome the biases of its members to obtain an accurate result," while in larger juries the "prejudices of individuals were frequently counterbalanced and objectivity resulted."

As recognized by Justice Blackmun, "the data now raise doubts about the accuracy of the results achieved by smaller * * * panels." 435 U.S. at 234. For example, experiments performed with law students indicate that whereas [5] twelve-person juries reached "correct" verdicts in a range from 71 to 83 percent of the time, six-person juries reach "correct" verdicts in a range of only from 57 to 69 percent of cases. *Ibid.* Indeed, it was found that six-person juries tended to reach "extreme results" 16 percent of the time, whereas twelve-person juries reached such results in less than 4 percent of cases. *Id.* at 234-35. Finally, it was also clear from the data that six-person juries were significantly less likely to return a verdict for a defendant and not to reach a verdict. As Justice Blackmun was forced to conclude:

> "All * * * of these * * * studies * * * raise significant doubts about the consistency and reliability of the decisions of small juries." *Id.* at 235.[1]

This growing recognition that a small jury is more likely to "run away" than the traditional twelve-person jury does not, of course, mean that the verdicts of all six-person juries should be disregarded. What it does mean is that

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[1] *Accord, e.g.*, Note, *The Right to a Jury Trial in Complex Civil Litigation*, 92 Harv. L. Rev. 898, 908 (1979) ("a jury composed of noneconomists or nonbusiness persons may well be unable to grasp evidence in an antitrust case presented in technical language with which it has no familiarity, such as evidence concerning cross-elasticity of demand, market power, [etc.]").

the interest in economy and efficiency that has led to the increasing use of six-person juries places a greater responsibility on the trial judge to scrutinize the verdicts rendered to make sure they are within the bounds of fair judgment applied to the evidence.

In making that analysis, it is recognized that an important consideration warranting very close examination is the amount of damages awarded by the jury compared to the evidence submitted to it. A large disparity between the damage award and the damage evidence not only requires vacation of the award itself, but it must be considered strong **[6]** evidence that the entire proceeding was not fairly considered. *E.g., Williams* v. *Slade,* 431 F.2d 605, 609 (5th Cir. 1970); *Southern Rwy Co.* v. *Madden,* 224 F.2d 320, 321 (4th Cir. 1955).

In the end, however, no listing of considerations can encompass every aspect of the trial that should be weighed. As concluded by Wright and Miller, the best general statement that can made is:

> "If, having given full respect to the jury's findings, the judge on the entire evidence is left with the definite and firm conviction that a mistake has been committed, it is to be expected that he will grant a new trial." *Id.* § 2806.

II. Grounds Requiring a New Trial

It is abundantly clear that the jury ran away with this case, or inadequately understood the complex issues presented, and rendered a verdict that does not represent a just resolution of the dispute. As demonstrated in defendants' memorandum in support of the motion for judgment n.o.v., there was virtually undisputed evidence at trial that precluded, as a matter of law, a verdict in plaintiff's favor on the monopolization and attempted monopolization claims against Du Pont. Furthermore, even cursory exam-

ination of the record makes it perfectly clear that plaintiff failed to produce substantial, credible evidence of conspiracy. In addition, the verdict as to damages not only is legally unsupportable but is for an amount that cannot possibly be reconciled with the evidence, particularly when viewed in light of the import duty and currency adjustments that occurred beginning in August 1971—which admittedly had a "disastrous" impact on plaintiff's business. Finally, irrelevant and inadequately qualified evidence was admitted of an undeniably prejudicial nature.

[7] For all these reasons discussed in the remainder of this memorandum, we respectfully submit that, whatever may be the result of the pending Rule 50 motion, it is not only the right but the duty of the Court to order a new trial.

A. *The Size of the Damage Award and the Presentation of Untrue Evidence Relating to Damages Requires That the Jury's Verdict Be Set Aside*

The jury returned a verdict of $2.5 million. This amount is grossly excessive in light of the only objective evaluations of plaintiff's real worth. Moreover, the only evidence tendered by plaintiff on damages was based on patently incorrect mathematical computations—errors that plaintiff's counsel had a duty to correct, but did not correct, before the jury retired to consider its verdict. For both of these reasons, a new trial must be granted.

1. The Size of the Damage Award Entered Against the Defendants Makes It Apparent that a Mistake Has Been Committed

The damage award made by the jury was capricious, illogical, unsupportable and unjust. Its size particularly stands out in the fact of testimony as to how small a value was placed on Daiflon at the only time in the course of its

existence—and that was before the import surcharge—when Daiflon was subject to an objective valuation.

Mr. R. D. McDonald, the principal investor in Daiflon, paid $100,000 for a 50 percent interest in Daiflon in early 1971. McDonald, Tr. 523, 554, 572-576. This was a time when, according to the summary of the evidence offered by plaintiff's counsel, Daiflon was going "like a house afire. From January of '71 to June of '71, they did great. They did great." Crawford, Tr. 1386. Mr. McDonald testified that the $100,000 that he paid for his 50 percent **[8]** interest in Daiflon was a fair price arrived at in an arm's length transaction. McDonald, Tr. 559.

The value assigned to Daiflon by Mr. McDonald was consistent with valuations made at about the same time by Mr. Carter and Mr. Adams, from whom Mr. McDonald purchased the Daiflon stock. In February 1971, Mr. Carter and Mr. Adams submitted personal financial statements to The United States National Bank in Galveston in which each, respectively, represented that his 25 percent interest in Daiflon was worth $50,000—for a total value for the company of $200,000. Carter, Tr. 254; Def. Exh. Nos. 7, 8. The jury rendered a verdict for more than ten times that amount!

Indeed, even a damage verdict of $200,000 would have been excessive. When Mr. McDonald purchased his 50 percent interest in Daiflon, and Mr. Carter and Mr. Adams made representations as to the value of their Daiflon stock, the import surcharge and the devaluation of the dollar as against the Japanese yen were only theoretical possibilities. The surcharge became a reality on August 15, 1971, and the devaluation of the dollar as against the yen occurred on December 15, 1971. Bradfield, Tr. 28; Carter, Tr. 176-177; Def. Exh. No. 6. Following imposition of the surcharge, Daiflon did not place any further orders for refrigerant gas with its Japanese supplier. Carter, Tr.

214-215. Continuation of Daiflon's business after that time was impossible.

Plaintiff's response at trial to these events was to assert that "it did not run out of [refrigerant] gas, it ran out of customers" McDonald, Tr. 547, 609; Crawford, Tr. 547, 609; Crawford, Tr. 546-547. What plaintiff necessarily meant by that assertion was that its business was destroyed by an event that preceded the import surcharge and the devaluation—the list price reduction first implemented by Du Pont in March 1971. Plaintiff asked the jury to believe that when **[9]** that reduction began to take hold in the marketplace, in June 1971, "[t]hey were out, and they realized they were out, and the bank advised them to go through whatever they called it, an orderly liquidation or something of that nature." Crawford, Tr. 1388.

Several documents were admitted at trial that show conclusively that the destruction of Daiflon's business was caused, not by the list price reduction in the spring of 1971, but by the import surcharge and the subsequent devaluation of the dollar.[2] But, for the present purpose, there is no reason to dwell on that evidence. Let us accept for now that Daiflon was put out of business as of June 1971. The question then becomes: what was the value of Daiflon as of June 1971 when, but for defendants' alleged wrongdoing, it was in any event going to be put out of business just two months later by events for which the defendants have no responsibility.[3] Since Daiflon had lost money

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[2] *E.g.*, Def. Exh. No. 9.

[3] Plaintiff made no effort at trial to show that continuing to import refrigerant gas from Japan after August 15, 1971, would have been economically feasible. Indeed, the undisputed evidence was that the imposition of the surcharge and the subsequent devaluation completely destroyed Daiflon's viability. *E.g.*, Def. Exh. No. 9.

heavily throughout its existence,[4] the only possible answer is that **[10]** in June 1971 Daiflon was worthless.[5]

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[4] Plaintiff's Amended Answer to Interrogatory No. 2 of Defendant's Second Set of Interrogatories gives a breakdown of Daiflon's costs and shows that Daiflon was losing about 15 cents on every pound of R-12 and R-22 that it was selling for 47¢/lb. and 70¢/lb., respectively for a weighted price of 64¢/lb. on the basis of the poundage sold of each of those gases. Def. Exh. No. 78. The interrogatory answer states that the cost information given there "is representative of Daiflon's costs for the years 1970, 1971 and 1972."

Plaintiff's President, Mr. Carter, implied during his direct examination that Diaflon realized a profit on its refrigerant gas sales in 1970. Carter, Tr. 102-103. On cross-examination he had to admit that the $58,000 figure that he had in mind covered not only Daiflon's refrigerant business, but also its admittedly profitable wholesale heating business, which was then part of the company. Carter, Tr. 276. Moreover, in cross-examination concerning Daiflon's financial statement for the year ended February 28, 1971 (Pl. Exh. No. 9), Mr. Carter further admitted that $43,668.48 of the $58,533.96 profit shown there was a gain on the sale of assets, which had nothing to do with refrigerants. Carter, Tr. 249. This financial statement shows refrigerant sales of $417,475 and heating and air-conditioning equipment sales of $687,570. The net profit from both of those operations was only $24,955. The costs shown in the statement include $178,784 of selling expenses which are not allocated between the two operations, but Mr. Carter admitted that the $11,978 in sales commissions and the $43,951 in freight out included in these selling expenses are attributable solely to refrigerants (Carter, Tr. 283, 285), making it clear that Daiflon in fact lost money on its refrigerant operations during the period for which Mr. Carter implied he had a profit.

[5] Plaintiff's evidence was that when the surcharge was imposed, in August 1971, Daiflon had between one and 1½ million pounds of refrigerant gas in its tanks. Carter, Tr. 196; McDonald, Tr. 484-485. Assuming plaintiff would have realized a profit of 3.6¢/lb. on this refrigerant gas but for the alleged antitrust violations by the defendants—a figure suggested by Dr. Benton Gup (Gup, Tr. 1123)—yields a fair market value for Daiflon of between $36,000 and $54,000 at the time it was allegedly driven out of business.

All of this leaves to one side, of course, the absurdities underlying plaintiff's damage theory, as presented by Dr. Gup. There

2. The Damage Verdict Must Be Set Aside Because It Was Based Upon Evidence That Plaintiff's Counsel Knew or Should Have Known, Was Untrue

Compounding the guesswork that Daiflon put before the jury through Dr. Gup, and the utter lack of comprehension that Dr. Gup admitted to concerning the Iskander computer program for whose results he had vouched on direct, the undeniable fact is that program itself contains gross [11] mathematical errors. Those errors, and the further exaggeration they cause in Dr. Gup's already preposterous figures, are described in the attached letter that defense counsel sent to plaintiff's counsel on March 25, 1979, and in the attached affidavit of Dr. Edward F. Stafford.

Plaintiff's counsel were put on clear and specific notice of these errors in open court on March 20 and 23, 1979, and by the hand-delivered March 25, 1979, letter. Apparently, plaintiff's counsel failed to make the inquiries called for in the circumstances. If made, the results would have required of them a repudiation on the record of the damage evidence previously introduced.[6]

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simply is no basis in the record for the assumption that, despite plaintiff's high costs and other operating problems, plaintiff would have realized a profit of 3.6¢/lb. on its sales of refrigerant gas.

And this also overlooks the inescapable reality that the gas Daiflon had on hand was a bottom-line liability rather than an asset. Daiflon was losing about 16 cents on every pound of R-12 and R-22 that it sold, and it was then selling the gas at an average weighted price of 64¢/lb. See the discussion of Def. Exh. No. 78 in footnote 4 on the preceding page. Thus, if Daiflon had sold the gas on hand at Dr. Gup's projected price of 60¢/lb., all it would have accomplished is that it would have lost 20¢/lb. instead of the 16¢/lb. it did lose on every pound it sold.

[6] The defects in plaintiff's damage evidence were compounded further when plaintiff's counsel invited the jury to speculate concerning the amount of damages that should be awarded. Referring to the numbers that Dr. Gup had presented as "certainly very solid evidence" (Crawford, Tr. 1513), counsel then went on to assert: "But the important thing is he concluded 2.96. Maybe it's

It would not be constructive to engage here in pointed and potentially acrimonious debate about whether the gross mathematical errors in plaintiff's damage presentation require that relief be granted under Rule 60(b) of the Federal Rules of Civil Procedure, or simply constitute [12] grounds for a new trial under Rule 59.[7] Suffice it to say that counsel have a responsibility not to permit a case to be decided on evidence that they know or should know is not true. That duty is absolute. It is not up to opposing counsel to call a witness to contradict the untrue evidence and then hope that the new evidence, rather than the untrue evidence, will be accepted by the jury, and that the jury will not be confused. This is particularly so when, as here, we are dealing with black-and-white propositions of mathematical certainty—not a matter about which experts might debate.

2.7; I don't know. Maybe it's four million; I don't know" (Crawford, Tr. 1513-1514); and "Dr. Gup says 2.96; maybe it's 2.3; maybe it's 2.78; maybe it's 3.6" (Crawford, Tr. 1516).

Particularly in these circumstances, the verdict must be set aside for the additional reason that plaintiff's own evidence shows that the damage award was not established by a preponderance of the evidence. As this Court correctly instructed the jury, to establish by a preponderance of the evidence means to prove that something is more likely so than not so. Dr. Gup's testimony boils down to the proposition that Daiflon's "most likely" fair market value is $2.96 million—give or take about $1.74 million either way. He admitted that the chances that the $2.96 million is the right number are less than 50/50. Gup, Tr. 970. A verdict based on that testimony is simply one not based on facts proved by a preponderance of the evidence.

[7] In Plaintiff's Response to Defendants' Hand-delivered Letter of March 25, 1979, plaintiff moved to strike the March 25, 1979, letter and to have defendants' counsel admonished for "improper" conduct in thus putting plaintiff's counsel on notice. At the same time, however, plaintiff studiously avoided saying anything about the merits of the issue. The inescapable facts are that plaintiff's counsel were given every opportunity, but failed, to repudiate the challenged testimony.

Accordingly, defendants seek a new trial on this ground. Should the Court deem the facts stated before it to be insufficient, we respectfully request leave to take the deposition of Mr. Fadel Iskander (and, if necessary, of others) to substantiate further this ground for a new trial.

B. *The Monopolization and Conspiracy Findings of the Jury Must Be Set Aside*

It is apparent that the jury's findings that Du Pont monopolized and/or attempted to monopolize the non-automotive refrigerant gas replacement market and that the defendants conspired to drive Daiflon out of business are contrary to the weight of the evidence. That evidence is discussed in detail at pages 5-44 of the memorandum in support of defendants' motion for judgment n.o.v., and there is no need to repeat it here. We pointed out in that memorandum that there was a complete failure of proof on the [13] liability issues in this case. At the very least, however, there can be no question but that the jury's verdict on these issues is contrary to the weight of the evidence. Accordingly, whether or not defendants' motion for judgment n.o.v. is granted, they are entitled to a new trial on these issues.

C. *A New Trial Also Is Warranted Because of Evidentiary Errors That Prejudiced Defendants' Right to a Fair Trial*

1. The Failure to Strike Mr. Campbell's Testimony Was Error

Mr. Scott Campbell, an accountant retained by plaintiff, testified that Du Pont had sold various refrigerants in various cylinder sizes at below-cost prices to two customers.[8] On cross-examination, however, Mr. Campbell ac-

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[8] The irony of this situation is that, as explained in our memorandum in support of defendants' motion for judgment n.o.v. (pp. 28-29), Mr. Campbell did not even purport to show any sales by

knowledged that, because he had not examined any invoices or cancelled checks, he did not know whether Du Pont actually had sold these products to these customers and, if so, the prices at which the products were sold; he acknowledged that his testimony was based on assumption for which he had no supporting facts. He also acknowledged, even more importantly, that he had plotted inaccurately the data that had been provided him as to Du Pont's costs and that it was only because of this inaccuracy that he was able to find hypothetical sales at hypothetical prices below Du Pont's **[14]** total costs. Mr. Campbell's testimony and charts, by his own admission, were "inaccurate and misleading." *E.g.*, Campbell, Tr. 886, 890-891, 899-901, 904-905. The Court, nevertheless, denied Du Pont's motion to strike Mr. Campbell's testimony. Tr. 932-934.

The Court's failure to strike Mr. Campbell's testimony permitted plaintiff's counsel to rely extensively on that testimony in his final argument (Crawford Rebuttal, Tr. 22-25)—even though Mr. Campbell himself had acknowledged that the testimony was inaccurate, misleading and factually unsupported.[9] Moreover, plaintiff's counsel com-

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Du Pont below du Pont's variable or marginal costs. Thus, the "sales" referred to by Mr. Campbell could not, in any event, be deemed predatory. *E.g.*, Pacific Engineering & Production Co. v. Kerr-McGee Corp., 551 F.2d 790, 795-97 (10th Cir.), *cert. denied*, 423 U.S. 897 (1977); *see also* William Inglis & Sons v. ITT Continental Baking, 1978-2 Trade Cas. ¶ 62,345 (9th Cir. 1978); Murphy Tugboat Co. v. Thomas E. Crowley, 1978-2 Trade Cas. ¶ 62,172 (N. D. Calif.); Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848, 858 (9th Cir. 1977), *cert. denied*, 99 S. Ct. 103 (1979); Hanson v. Shell Oil Co., 541 F.2d 1352, 1358-59 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977).

[9] Defendants, other than Du Pont, are doubly prejudiced by the Court's refusal to strike Mr. Campbell's testimony because there was absolutely no evidence submitted by plaintiff as to their costs, let alone sales below their costs—yet, the Court inferred that such evidence existed when it instructed the jury that the "Defendants

pounded the error by improperly suggesting to the jury that, to the extent that there was any problem with Mr. Campbell's charts, it was due to the asserted fact that Du Pont had not supplied the information it was obligated to provide in this case. Plaintiff's counsel had the temerity to make this suggestion despite the Court's statement, in sustaining an objection to a question on redirect examination of Mr. Campbell, that

> "[t]he Court gave counsel complete access to all of these reports, documents, books, records and everything, and if counsel didn't give it to him or he didn't go get it, it is no problem at this time." Tr. 919.

The Court also stated:

> "You can't say he or you were not afforded an opportunity to have all the books and records that any of these defendants have, and if they didn't ask for invoices and checks relative to it, you didn't.
>
> **[15]** "But the Court made sure that you had an opportunity to get this information such as the invoices and the checks." Tr. 927.

In sum, a new trial is required because the Court failed to strike Mr. Campbell's testimony and plaintiff improperly attempted, on final argument, to pin the blame on Du Pont for the inaccurate and misleading testimony that Mr. Campbell acknowledged he had presented to the jury.

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were charged with engaging in predatory pricing." The Court's failure to strike Mr. Campbell's testimony and Mr. Crawford's frequent references to "predatory" pricing by the defendants created reversible error. *See*, Miles & Sons Trucking Service v. McMurtrey, 341 F.2d 9 (10th Cir. 1965).

2. THE COURT ERRED BY ADMITTING INTO EVIDENCE HIGHLY PREJUDICIAL WRITTEN STATEMENTS THAT FAILED TO MEET THE STANDARDS FOR ADMISSION UNDER THE FEDERAL RULES OF EVIDENCE

During the course of the trial, the Court admitted into evidence some 275 exhibits that were offered by plaintiff. Many of these exhibits were not identified by any live witness or in any deposition testimony, and no factual predicate was laid that would have permitted the exhibits to be received as an admission by one or more of the defendants or under the business records exception to the hearsay rule. In addition, a number of exhibits contained inadmissible double hearsay.

The responsibility for this remarkable situation rests squarely with plaintiff, which failed to comply with those provisions of the pretrial order governing the exchange of exhibits. This failure placed defendants and the Court in the unenviable position of having to deal with numerous complex evidentiary questions in a manner that precluded the most careful consideration. As a result, many inadmissible documents were received into evidence to the prejudice of defendants. This constitutes an independent ground requiring the award of a new trial.

The pretrial orders that were entered in this case obviously contemplated, and made provision for, the exchange of all exhibits sufficiently in advance of trial to permit any objections to be raised and disposed of before the trial **[16]** began. Pretrial Order (5-15-78); Supplement to Pretrial Order (6-26-78). Unfortunately, this did not occur. Defendants received from plaintiff prior to trial a listing of approximately 2,000 documents, with an implied representation that plaintiff intended to offer those documents as exhibits during its case-in-chief. Because of the sheer number of the documents, defendants found themselves un-

able to raise objections to individual documents and without a clear idea of the nature of the documentary evidence to which they would be required to respond. Defendants explained this situation to the Court by letter dated August 28, 1978. Then, after the trial date was continued, defendants communicated with plaintiff's counsel by letter dated 1-17-79, to ask whether plaintiff was prepared to represent in good faith that it intended to offer all of these documents during its case. Plaintiff did not respond to that letter.

At the final pretrial conference in this case, which was held on the Friday before trial was to begin defendants again requested that they be informed of the exhibits that plaintiff planned to offer during its case-in-chief. The Court thereupon ordered plaintiff to comply with defendants' request. On March 3, 1979, plaintiff supplied defendants with a new, and somewhat reduced, listing of the exhibits it intended to offer. This step in the direction of compliance came too late, however, to permit defendants to raise prior to trial objections to individual documents and to obtain rulings from the Court—as contemplated by the pretrial orders.

Plaintiff succeeded in making this already difficult, and unfair, situation much worse by offering into evidence as the trial progressed numerous documents that had not been identified by any live witness or in deposition testimony. Following the reading of individual depositions, [17] plaintiff's counsel would approach the bench and seek to have such documents admitted en masse. The situation thus created by plaintiff became so confusing that neither the defendants nor, indeed, the courtroom clerk were able to identify with certainty until near the end of trial which documents were being offered, and for what purpose.

Over defendants' objections, 95 documents eventually were received into evidence without the slightest predicate

being laid for their admission.[10] None of these documents was properly identified in testimony offered at the trial. None was properly qualified as a business record of any of the defendants, or of a third party. No evidence was introduced that might have permitted the Court to conclude that any of the documents contained admissions by a party and were admissible on that basis.

A verdict based on such wholesale disregard of the specific requirements of the Federal Rules of Evidence, and of commitments made when plaintiff executed the pretrial orders in this case, cannot be permitted to stand. An indication of the extent to which the present verdict is in fact premised on inadmissible documentary "evidence" is provided by the fact that of the 28 exhibits that plaintiff's counsel mentioned in the opening portion of his closing summation, 17 were not properly identified by any witness.[11] In addition, many of these 17 documents contained double hearsay—which would have prevented their **[18]** admission even if a witness had been present who might have identified them or qualified them as a bona fide business record of one of the defendants.[12] Rule 805, Fed. R. Evid.

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[10] *See, e.g.*, 1001, 1009, 1036, 1044, 1244, 1062, 1095, 1203, 1223, 1267, 1296, 1297, 1301, 1303, 1320, 1321, 1322, 1323, 1325, 1326, 1329, 1330, 1335, 1346, 1340, 1341, 1342, 1343, 1344, 1345, 1346, 1347, 1348, 1351, 1353, 1354, 7074, 7092, 7116, 7118, 7122, 3000, 3001, 3010, 3011, 3013, 3014, 3016, 3019, 3025, 3042, 3043, 3045, 3065, 5066, 3074, 3103, 9069, 3503, 3508, 3509, 3510, 3512, 3558, 3666, 3667, 3668, 3669, 3678, 3733, 3734, 8034, 4506, 4512, 4513, 4516, 4521, 4526, 4547, 4554, 4556, 4557, 4558, 4559, 4563, 4577, 4589, 4001, 4005, 4006, 4026, 4031, 4036, 4054, 4134.

[11] Pl. Exh. Nos. 1062, 1303, 1333, 1351, 1092, 7116, 3013, 3016, 3015, 3045, 3510, 4506, 4556, 4557, 4558, 4559, 4036.

[12] Pl. Exh. Nos. 3013, 3016, 3025, 4556, 4558, 4559. Other exhibits that were mentioned in deposition testimony were objectionable on the same ground. *E.g.*, Pl. Exh. Nos. 1009, 1036, 1267, 3000, 3013, 3014, 3065, 3066, 3067, 3068, 3078, 3733, 4512, 4513, 4516, 4521, 4526, 4547, 4554, 4552, 4563, 4589.

Plaintiff's counsel attempted repeatedly to justify the admission of these documents by asserting that plaintiff had found the documents in one of the defendant's files, or that the documents had been turned over by one of the defendants pursuant to plaintiff's discovery requests. Counsel apparently was laboring under the mistaken impressions that any document, or slip of paper, found in a defendant's files is admissible by that fact alone.

Under the Federal Rules of Evidence, however, as under preexisting law, "[t]he requirement of authentication or identification [is] a condition precedent to admissibility * * * *." Rule 901(a), Fed. R. Evid. Plaintiff failed to comply with this most fundamental evidentiary requirement. Although plaintiff's counsel suggested at several points during the trial that some or all of the documents being offered were "self authenticating," none of the documents challenged by defendants was admissible on that theory.[13]

Moreover, even if plaintiff had succeeded in authenticating all of the documents that it offered, the **[19]** documents would be barred by the hearsay rule unless the documents were qualified as a "business record" or a party "admission," as those terms are defined in the Federal Rules of Evidence. Under Rule 803(6), documents may be admitted as business records when they are:

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[13] Rule 902 of the Federal Rules of Evidence provides that "[e]xtrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to" the following categories of documents: (1) domestic public documents under seal, (2) certain public documents not under seal, (3) foreign public documents, (4) certified copies of public records, (5) official publications, (6) newspaper and periodicals, (7) trade inscriptions and the like, (8) acknowledged documents, (9) commercial paper and related documents and (10) any matter declared by Act of Congress to be presumptively or prima facie genuine or authentic. None of the documents challenged by defendants fit into any of these categories.

> "Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method of circumstances of preparation indicate lack of trustworthiness. * * "

Plaintiff did not offer any testimony that would have permitted this Court to conclude that the documents in question were made "at or near the time" of the events referred to in the documents; that any information set forth in the documents was transmitted or recorded by someone with knowledge; that the documents were kept in the course of a regularly conducted business activity; or that it was the regular practice of the defendant in whose files particular documents were found to make or maintain such documents. And even if these essential factual predicates had been established by competent evidence, the documents nevertheless should have been excluded if "the source of the information or the method of circumstances of preparation indicate lack of trustworthiness." Rule 803(6), Fed. R. Evid. The latter requirement was not discussed at length during the course of the trial because plaintiff failed so completely to satisfy even more basic requirements for admissibility.

Contrary to the assertions of plaintiff's counsel, merely because documents are located in a defendant's files (*e.g., Bisno* v. *United States,* 299 F.2d 311, 711, 718 (9th [20] Cir. 1961)), or because a sufficient number of entries or similar documents are located to indicate some regularity in the documents' preparation (*e.g., United States* v. *Plisco,*

192 F. Supp. 337 (D.D.C. 1961)), does not establish that the documents are business records. As Judge Weinstein has stated:

> "Records of regularly conducted activity are not normally self-proving as public records may be [citations omitted]. The testimony of the custodian or other qualified witness who can explain the record keeping of his organization is essential. If the witness cannot vouch that the requirements of Rule 803(6) had been met, the entry must be excluded." (4 Weinstein's *Evidence* 803-143 (1978).

Furthermore, the opinions and conclusions of a defendant's employee, or of a third party, even though expressed in writing, are not admissible as a party "admission" unless the foundation requirements of Rule 801(d)(2) have been satisfied. Under that Rule, the statement must be one within the scope of the declarant's employment. Alternatively, there must be evidence that the defendant authorized the employee to speak on its behalf with regard to the matters discussed in the statement. Neither of these requirements was satisfied here—indeed, they could not have been satisfied because of the complete absence of *any* tstimony concerning the documents in question.

The erroneous admission of documents provides grounds for the granting of a new trial whenever substantial prejudice may have resulted. *See, e.g., Julander* v. *Ford Motor Company,* 488 F.2d 839 (10th Cir. 1973); *Continental Baking Company* v. *Utah Pie Company,* 326 F.2d 161 (10th Cir. 1968). Plaintiff can hardly contend that there was no prejudice here since, as already noted, 17 of the 28 exhibits that plaintiff's counsel used in the opening portion of his closing argument were admitted without any qualifying testimony. Indeed, the verdict in this case provides a **[21]** dramatic illustration of the reasons for excluding the type of evidence plaintiff used. Plaintiff made extensive

use here of intra-company memoranda and communications as party "statements" and "admissions." Through these exhibits, plaintiff caused rumor, speculation and opinions to become "facts" for an unwitting jury. As Judge Weinstein has stated:

> "[A]lthough commentators have suggested that an employee will not make a false statement damaging to his employer, both because he is interested in his employer's welfare, and because he does not wish to jeopardize his job, these reasons, while in part justifying the extension of the doctrine of vicarious admissions [reference omitted] do not vindicate the unqualified admission of statements not based on personal knowledge. Such a statement may often consist of no more than gossip or speculations about the matter in issue. The mere fact that the agent heard it and repeated it does not remove any of the dangers against which the hearsay rule has traditionally guarded. [Reference omitted.]
>
> "The danger is particularly apparent as regards intra-company reports. Certainly, even an employee well-disposed towards his employer may report rumors he has heard, not because of their trust, but because his employer may be interested in the fact that there are rumors. Allowing a report containing rumors not based on personal knowledge to be used indiscriminately against the employer amounts to a wholesale endorsement of the adage, 'where there's smoke, there's fire.' Moreover, it may be doubted, particularly in an era of widespread unionization, whether the theory that an employee would not spread unverified gossip because of fear for his job has much validity. Rather, it would seem a fact of human nature that rumor, unsubstantiated by fact, is at all times prevalent and virulent." 4 Weinstein's *Evidence* 801-132 (1978).

Plaintiff's failure in this case to designate only those exhibits it intended, in good faith, to use in its case-in-chief, as required by the pretrial orders, as well as plaintiff's extraordinary method of offering documents [22] into evidence without supporting testimony and proper foundation, permitted counsel for plaintiff to assert as "fact" what was nothing more than hearsay, rumor, gossip, speculation and opinion. That this caused extreme prejudice to defendants' right to a fair trial cannot be doubted.

III. CONCLUSION

Whether or not defendants' motion for judgment n.o.v. is granted, defendants are entitled to a new trial. There can be no question that "a mistake has been committed." Wright & Miller, *Federal Practice*, § 2806. The jury could not have heeded the Court's instructions, faithfully considered the evidence, and then returned with the verdict that it did in this case.

There was *no* evidence that Du Pont's share of the non-automotive replacement market exceeded 50 percent—yet the jury found to the contrary. There was *no* probative evidence to support a damage award of $2.5 million—yet the jury found that this was the amount of plaintiff's losses. The same can be said for the answers to other interrogatories put to the jury—the answers make no sense in light of the evidence in this case and the Court's instructions.

This jury simply ran away with this case, as six-person juries have been known to do with disproportionate frequency. Whether the jury responded to the emotional appeal inherent in the weeping of plaintiff's counsel, or simply was unable because of the complexity of the economic and legal issues tendered to it to consider the evidence and heed the Court's instructions, the jury's verdict is patently unjust. In addition, the jury's verdict is defective because of the mass of inadequately qualified and

inadmissible [23] exhibits to which the jury was exposed. A new trial therefore must be granted.

Respectfully submitted,

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Dated April 19, 1979.

CERTIFICATE OF SERVICE

I hereby certify that on this 2d day of May, 1979, I served upon all counsel of record in this case a copy of the above designated pleading.

/s/ D. KENT MEYERS
D. Kent Meyers

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

No. 72-C-483

DAIFLON, INC., *Plaintiff*,

v.

ALLIED CHEMICAL CORPORATION, et al., *Defendants*.

AFFIDAVIT

COUNTY OF OKLAHOMA
STATE OF OKLAHOMA, SS:

EDWARD F. STAFFORD, being duly sworn, deposes and says:

1. I am Assistant Professor of Business Administration in the College of Business Administration at the University of Oklahoma. I have a Ph.D. in Business Administration and one of my specialties is quantitative business analysis, which includes computer simulation modeling.

2. I have examined the printouts programmed by Fadel F. Iskander [DX-76 in this case], representing a simulation model which uses certain values shown in the chart entitled "Financial Model Used to Determine Value of Daiflon, Inc." [DX-79].

3. There are at least the following mathematical errors in the Iskander program:

a. An erroneous formula in Subroutine "SIM" (lines 79.000 to 79.300) of the program calculates the net income for each of the years of the simulation as equal to the net income in the last year of the simulation.

b. The same Subroutine (line 79.200) contains an erroneous formula for calculating the discount factor for determining present worth. Instead of calculating a constantly *decreasing* present worth of $1 as that dollar is

earned further and further in the future, this erroneous formula results in the present worth of that future $1 income approaching, equaling, and then remaining at $1.

c. I am informed that Dr. Gup testified that year 1 in the model does not contain a growth factor for size of market. However, the same Subroutine (line 79.000) assumes market growth already in year 1. Thus size of market is overstated in year 1 and all succeeding years.

4. To illustrate these errors, I have written a program (reflected in the attached printout) in which I have compared mathematically correct calculations with the incorrect ones reached by applying the Iskander formulas, using all the "low" values (Table 1), "medium" values (Table 2), and "high" values (Table 3) of the Iskander program.

5. The correct calculations using just the "medium" values result in a total value of $1,287,058. Using the incorrect Iskander formulas results in a value of $3,157,851. (See Table 2.) And using the incorrect Iskander formulas created a range of $49,285 to $80,369,630 instead of the correctly calculated range of $41,637 to $12,158,301 for selecting values in executing the Iskander program.

6. This affidavit does not concern itself with the validity of the values used in the Iskander simulation model, nor with the validity of the model itself; it concerns itself solely with the correctness of certain mathematical calculations in the Iskander program.

/s/ Edward F. Stafford
Edward F. Stafford

Subscribed and sworn to before me this 12th day of April, 1979.

Sharon G. Haskell
Notary Public

My Commission Expires:
December 28, 1980
[Seal]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 72-C-483-B

DAIFLON, INC., *Plaintiff*,

vs.

ALLIED CHEMICAL CORPORATION, et al., *Defendants*.

RESPONSE OF DEFENDANTS TO PLAINTIFF'S SUBMISSION PURSUANT TO THE COURT'S SUGGESTED TRIAL PROCEDURE AND APPLICATION FOR STATUS CONFERENCE

This Response of the defendants addresses itself to a series of practical problems which remain in the preparation of this case for jury trial and with which the Court should deal prior to commencement of the trial on September 11, 1978.

Last June the Court signed an agreed Supplement to Pre-Trial Order which provided . .

> "On July 24, 1978, the plaintiff will produce copies of and deliver to the defendants all documents, marked and numbered, to be used at trial.
>
> * * *
>
> "On August 7, 1978, the plaintiff will designate and provide the defendants with a document, reflecting by page and line number, all deposition testimony to be used by it at trial."

The plaintiff's submission included approximately 2,000 separately marked and numbered exhibits which were to be used at trial. Additionally, plaintiff designated 3,077 pages from thirty different depositions to be read to the jury.

All of the defendants were disturbed and perplexed at this massive and wholly unmanageable quantity of documents and deposition testimony the plaintiff proposed to offer. The large number of duplicate documents as well as the apparent irrelevance of many of the documents and deposition testimony to the questions presented in this case indicated to the defendants that plaintiff had not limited its designations to materials it actually intended to use at trial. Therefore, on July 26 defendants called this situation to the Court's attention in an Application wherein we sought appropriate relief and instructions from the Court.

On August 4, the Court held a hearing where this chaotic situation was aired. The Court told plaintiff to furnish the defendants the exhibits it intends to use and to specify the deposition testimony, by page number, it intends to read to the jury. (August 4, 1978 Hrng. Tr., pp. 35, 40, 42.) After this hearing the Court issued and filed on August 7 a Suggested Trial Procedure wherein the Court requested both sides to reduce, where possible, the mass of deposition testimony and documentary evidence so the jury could understand the issues and not be "exhausted by irrelevant, time-consuming preliminary evidence." The parties were asked by the Court to reduce the deposition testimony deemed to be pertinent and relevant to typewritten form and submit to the other side the exhibits each proposed to use at the trial. On August 22, the date for submission of these materials, the plaintiff delivered sixteen deposition transcripts out of thirty it had originally designated. (Plaintiff tells us that the other fourteen transcripts are being reproduced and will be delivered later.) A cursory examination of the sixteen transcripts delivered reveals that plaintiff has not made any meaningful reduction of the volume of proposed deposition testimony. In compar-

ing the sixteen transcripts delivered on August 22 with plaintiff's original submission, we find the following:

Witness	No. of Pages Per Original Designation	No. of Pages Per Court's Suggested Trial Procedure
Wright	194	184
Andrews	18	18
O'Donnell	166	166
Jones	19	21
Broeckelmann	122	122
Karr	39	38
Muse	28	28
Cawthon	66	66
Montrose	36	36
Barnhart	32	32
Kestenbaum	92	89
Gresham	61	59
Stewart	31	32
Stone	39	39
Gennett	96	94
Prevatt	95	95
Total	1,134	1,129

From these sixteen transcripts we find a net reduction of five pages. Plaintiff has eliminated a few pages from each deposition but, by and large, the deleted portions contain the usual banter and objections between counsel that is common in such proceedings. In some instances, we find that plaintiff has actually added testimony not included in its original submission. Plaintiff has not made any reduction in the quantity of deposition testimony it proposes to read. Very few questions and answers have been eliminated.

In response to the second paragraph of the Suggested Trial Procedure, plaintiff apparently has not altered its

position at all with respect to its intention to offer 1,961 exhibits at the trial. We received nothing from the plaintiff on August 22 to indicate that it planned to eliminate any of the exhibits previously delivered.

Defendants, for purpose of this response, must accept the plaintiff's actions in response to the Court's Suggested Trial Procedure as a good faith reaffirmation of its intent to actually read 3,077 pages of deposition testimony to the jury and to read, at least in part, to the jury each of the approximately 1,960 exhibits containing 4,588 pages. If, however, plaintiff actually intends to pare down this mass of paper and not read substantially all of it at trial, the Court and defendants are entitled to know that *now*, so that defendants can efficiently prepare their case and the Court (and the jurors) can be aware of the time this trial will actually take. To learn this on the eve of trial is too late. We are entitled not to be sandbagged.

The six defendants have collectively designated approximately 270 pages of deposition testimony and have marked and delivered to plaintiff 47 exhibits which they plan to offer.

The sum of the evidence both sides plan to offer, exclusive of live witnesses, is as follows:

	Plaintiff	All Defendants	Total
Deposition Witnesses	30	12	42
Deposition Pages To Be Read	3,077*	270	3,347
Exhibits	1,961	47	2,008

Defendants are in the same position that we were in when we came to the Court on August 4, if not worse. We

* This is the total of deposition pages in the original submission. We do not have all of the transcripts under plaintiff's second submission and thus cannot give the Court the new total.

thought one of the main purposes of discovery and pre-trial proceedings was to pare down, organize and simplify the evidence to enable the trial to go forward in an orderly and expeditious manner so that the jury will not be exhausted. We are now faced with what we estimate to be 100 hours of deposition testimony (assuming it can be read to the jury at a 30-page per hour rate), plus untold days of reading from over 2,000 exhibits (containing over 4,500 pages), not to mention the time involved in presenting the testimony of the witnesses.

The Court's Suggested Trial Procedure requests that we present objections to each of the 2,000 exhibits the plaintiff has delivered to us by Monday, August 28. We find ourselves wholly unable to provide such a document-by-document list of objections, and must inform the Court that we have no choice but to wait until the evidence is actually offered at the trial so that we may object to it in context. We have no way at this time of knowing what the plaintiff proposes to prove with the evidence in its present state. Our interpretation of the Court's Suggested Trial Procedure was for the parties to actually make an offer of proof so that the other side could intelligently and with some degree of precision make objections. This would not only enable the parties, but also the Court, to have a grasp of what we are going to be dealing with at the trial. Given the present state of affairs, the litigants and the Court are going to trial on September 11 in the dark.*

We do not believe that justice requires a jury to sit for three or more weeks and listen to the reading of deposition testimony which, for the most part, we feel is either

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* There is one additional problem. Under the Supplement to Pre-Trial Order defendants are to supplement their list of witnesses by August 28 but, in light of the fact that we are still in the dark as to the nature of plaintiff's case, it may be necessary for defendants to call additional witnesses, not included on our August 28 list, depending on the case presented by plaintiff at trial.

irrelevant or cumulative. Nor do we believe that a jury could realistically cope with the 2,000 exhibits that plaintiff apparently intends to attempt to introduce. The jury simply could not grasp and understand the issues when the evidence is presented in such a disorganized and unmanageable manner. The Court's calendar presently has this case scheduled to be tried for three weeks in September and three weeks in November. Faced with the enormity of plaintiff's confused case, we do not see that the trial can realistically be expected to be completed within that time frame. This also complicates jury selection because many jurors will no doubt be unable to sit for such an extended and indefinite period of time.

The defendants want to begin the trial on September 11. Delay is not our purpose. We are, however, compelled to once again call to the Court's attention and complain about the plaintiff's actions.

We ask that the Court call a status conference at its earliest convenience so that we can once again attempt to resolve the procedural bottlenecks which we believe present a fatal impediment to an orderly and just trial. Defense counsel have labored long and diligently in an effort to get this case ready for trial on September 11. We do not want this to be lost in a maze of obfuscation and chaos unnecessarily created by the plaintiff.

DATED this 25th day of August, 1978.

/s/ JAMES M. STURDIVANT
James M. Sturdivant of
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For All Defendants.

CERTIFICATE OF MAILING

I hereby certify that on this 25th day of August, 1978, a copy of the within and foregoing RESPONSE OF DEFENDANTS TO PLAINTIFF'S SUBMISSION PURSUANT TO THE COURT'S SUGGESTED TRIAL PROCEDURE AND APPLICATION FOR STATUS CONFERENCE was mailed to B. Hayden Crawford, 1714 First National Building, Tulsa, OK 74103, Joel L. Wohlgemuth, Philtower Building, Tulsa, OK 74103, and Frank Gregory, Philtower Building, Tulsa, OK 74103, with postage fully prepaid thereon.

/s/ JAMES M. STURDIVANT
James M. Sturdivant

[ADDITIONAL ATTACHMENTS DELETED IN PRINTING]